83-1591
No. ___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CHARTER CONSOLIDATED, LTD., CHARTER CONSOLIDATED INVESTMENTS, LTD., and CENTRAL MINING FINANCE, LTD.,
Petitioners,

—v.—

ANTHONY A. BARBER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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March 26, 1984

QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment was violated by the exercise of *in personam* jurisdiction over a foreign parent corporation based solely upon the parent's ownership of subsidiaries which were present in the forum state.

2. Whether the due process clause of the Fourteenth Amendment was violated by the exercise of *in personam* jurisdiction over a foreign corporation whose only contacts with the forum state consisted of occasional visits to the state by employees, when such visits were unrelated to the cause of action.

LISTING OF PARTIES

Respondents, in addition to Anthony A. Barber, include:

William A. Blauvelt, Eugene L. Bosworth, Kenneth Bowser, Gaylon S. Clinton, Larry A. Commino, Charles L. Croop, Merle Crowley, Jack A. Dalaba, Harry I. Daugherty, Larry D. Daugherty, Carle Earle, Bruce A. Fessenden, Frank E. Hamsher, Robert F. Haskins, Norman E. Henton, Lawrence R. Jacks, Eugene M. Lewis, Dean H. Meacham, Merritt M. Miller, Phillip Miller, Verne M. Nichols, Edward V. Nolder, Albert L. Rees, Christian G. Renner, Lawrence G. Roberts, Alton P. Spencer, Leo H. Stout, Carlton L. Summers, Bert A. Tucker, Donald F. Tucker, Patricia Barber, Irva M. Blauvelt, Donna J. Bosworth, Shirley Bowser, Donna Clinton, Lois A. Commino, Jean K. Croop, Joann Crowley, Mary Alice Dalaba, Nancy A. (Mrs. Harry) Daugherty, Gayle M. (Mrs. Larry) Daugherty, Gladys A. Haskins, Mrs. Eugene Lewis, Mrs. L. R. Jacks, Charlene Meacham, Shirley B. (Mrs. Merritt) Miller, Frances (Mrs. Phillip) Miller, Agnes L. Nolder, Rita T. Rees, Janet Renner, Isola M. Roberts, Marie L. Stout, Donna L. Summers, Maxine L. (Mrs. Bert A.) Tucker, Beverly A. (Mrs. Donald) Tucker, Richard J. Abbott, Thomas Astle, Daniel E. Baker, Edward W. Rutler, Lynn Caulkins, Ralph L. Crowe, Clifford L. Dawley, Homer Falk, Walter Leroy Finster, David Groff, Ted B. Harris, Carl C. Hoofftallen, Thomas H. Lamont, Harry L. Rossman, Warren E. Tripp, Ronald Varney, Stafford F. Waterman, Maxine L. Abbott, Hope M. Astle, Genevieve G. Butler, Louise Caulkins, Florence Crowe, Mary R. Dawley, Gloria Groff, Phyllis Hamsher, Mary J. Harris, Mary A. Lamont, Doris Tripp, Norma E. Varney, Arlene P. Waterman, Stanley E. Major, Helen June Baker, Beatrice B. Major, Robert Teuscher, Gerald L. Barnes, Betty A. Barnes, Mary L. Baker, Pittsburgh Corning Corporation, PPG Industries, Inc., and Corning Glass Works, Inc.

Other defendants, who are not joining this Petition, include:

Cape Asbestos Fibres, Ltd., Cape Asbestos South Africa Proprietary, Ltd., Egnep (Pty) Ltd., Amosa, Ltd., North American Asbestos Corp., Charles G. Morgan, Geofrey Higham, Dr. Richard Gaze, Cape Board & Panels, Ltd., W. B. Arnold Co., and X, Y & Z Corporations.

Third-party defendants include:

Commonwealth of Pennsylvania, and American Flint Glass Workers Union, AFL-CIO.

LISTING UNDER SUPREME COURT RULE 28.1

As required by Supreme Court Rule 28.1, set forth below is a listing of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioners Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finance, Ltd.:

Alexander Morrison (Builders) Limited
Anmercosa Sales Ltd.
Anglo American Corporation of South Africa Limited (owns 41 percent of the equity capital of Minerals and Resources Corporation Limited)
Anglo American Corporation Zimbabwe Limited
Beralt Tin and Wolfram Limited
Beralt Tin and Wolfram (Portugal) SARL
Cape Industries PLC
Cemboard Malaysia SDN BHD
Cleveland Potash Limited
Covenant Industries Limited
Eastern Cape Limited
Hunting Painting Contractors Limited
Johnson Matthey PLC
Minerals and Resources Corporation Limited (owns 35.7 percent of the equity capital of Charter Consolidated PLC)
National Mine Service Company
Pandrol Avaux SA
Pandrol Canada Limited
Pandrol da America Latina Participacoes LTDA
Svenska Bromsbandsfabriken AB
Wheal Crofty Holdings Limited

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CHARTER CONSOLIDATED, LTD., CHARTER CONSOLIDATED INVESTMENTS, LTD., and CENTRAL MINING FINANCE, LTD.,
Petitioners,

—v.—

ANTHONY A. BARBER, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania, entered in this proceeding on December 27, 1983.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania, denying petitioners an allowance of appeal, appears as Appendix A hereto. The opinion of the Superior Court of Pennsylvania, reported at 464 A.2d 323, appears as Appendix B hereto. The opinion of the Court of Common Pleas of Allegheny County, Pennsylvania appears as Appendix C hereto.

The order of the Superior Court denying the petition for rehearing and the amended order of the Court of Common Pleas respectively appear as Appendix D and Appendix E hereto.

STATEMENT OF JURISDICTION

The order of the Pennsylvania Supreme Court was entered on December 27, 1983 (App. A at 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1983).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 5301 and 5322 of 42 Pa. Cons. Stat. Ann. are also involved, and are reproduced in Appendix F hereto.

STATEMENT OF THE CASE

I. Procedural History

On August 21, 1979, current and former employees of the Pittsburgh Corning Corporation ("Pittsburgh Corning") and their wives filed a complaint against Charter Consolidated, Ltd. ("Charter") and others seeking redress for injuries allegedly suffered from exposure to asbestos dust and fibers in and around Pittsburgh Corning's Port Allegheny, Pennsylvania plant during the period 1964 to 1972. A First Amended Complaint, dated February 4, 1980, added as defendants Charter Consolidated Investments, Ltd. ("CCI") and Central

Mining Finance, Ltd. ("CMF"), which are wholly owned subsidiaries of Charter.[1]

On December 26, 1979, Charter filed preliminary objections to the complaint, challenging the exercise of *in personam* jurisdiction by the Pennsylvania Court of Common Pleas. After extensive discovery, the trial judge overruled Charter's objections by a decision and order, dated December 31, 1981 (App. C at 20a). In order to permit an immediate appeal to the Pennsylvania Superior Court, the lower court amended its order on January 20, 1982 to state that a "substantial issue of jurisdiction" was raised by petitioners' preliminary objections (App. E at 34a).

Charter appealed to the Superior Court on January 26, 1982. Oral argument was heard on January 13, 1983, and on July 1, 1983, the lower court's denial of the preliminary objections was affirmed (464 A.2d 323; App. B at 2a). Charter's subsequent petition for reargument was denied on September 13, 1983 (App. D at 32a).

On October 13, 1983, Charter petitioned for allowance of an appeal to the Pennsylvania Supreme Court. On December 27, 1983, the petition was denied *per curiam* (App. A at 1a).

In asserting jurisdiction over Charter, the Pennsylvania courts relied on three theories. First, they found that Charter had transacted business in Pennsylvania and the complaint arose out of those transactions. Because Charter has never been in the asbestos business, this finding depended on the conclusion that Cape Industries Ltd. ("Cape"), Charter's partially owned subsidiary which was in this business, was Charter's alter ego.

The second theory of jurisdiction was that Charter carried on a "continuous and systematic" part of its general business in Pennsylvania. The court concluded that a Charter subsidiary, Pandrol International, and its subsidiary, Pandrol, Inc., both manufacturers of rail fastenings, conducted business in

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1 Arguments in this Petition made on behalf of Charter should also be deemed made on behalf of CCI and CMF.

Pennsylvania and that their activities, like Cape's, could be ascribed to Charter.

Finally, the courts determined that Charter was itself engaged in continuous and systematic business activities in Pennsylvania by virtue of certain visits to the Commonwealth by Charter employees.

II. Statement of Facts

A. *Charter and Its Subsidiary Companies*

Charter, an English corporation, is a publicly held investment holding and finance company. Since its incorporation in 1964, it has invested in a variety of companies, most of which are engaged in industrial, mining, and finance and investment activities. Charter's investment holdings vary from 100 percent to a fraction of one percent. Charter has never engaged in the mining, manufacturing, or marketing of asbestos, or in any other asbestos-related activities. Charter owns several holding companies, including CCI and CMF, which hold the shares of the companies in which Charter invests. Charter also owns a service company, Charter Consolidated Services Ltd. ("CCS"), which provides various corporate and purchasing services and employs Charter's employees.

1. *Cape*

Charter owns 67.3 percent of the stock of Cape, an English corporation formed in 1893. The balance of Cape's shares are publicly held and traded on the London Stock Exchange. Cape owns subsidiaries engaged in a wide variety of businesses, including the manufacture and building of insulation products, insulation contracting, and the manufacture and distribution of friction materials and automotive parts. Until 1979, Cape owned, through its subsidiaries, companies engaged in the mining and manufacturing of South African asbestos.

One of three companies that merged to form Charter in 1965 owned an indirect 16.7 percent interest in Cape's shares, and Charter inherited this interest. From 1965 to 1969, Charter increased its interest in Cape to 25 percent through occasional

open market purchases made by its investment holding subsidiaries. In May 1969, Charter made a tender offer for 50 percent of the outstanding Cape shares not already held by Charter. As a result of the tender offer, Charter's interest increased to approximately 62 percent. From 1969 to 1978, Charter gradually increased its holdings in Cape to 67.3 percent as an underwriter of Cape's stock and through open market purchases. The percentage of Charter's indirect interest has not changed since that time.

Cape was run independently of Charter before the 1969 tender offer, and it has continued to be managed independently thereafter. Charter's independence from Cape is demonstrated by the following factors, among others:

(1) The two companies maintain separate offices, books and records, and bank accounts.

(2) The two companies hold separate board meetings and shareholders' meetings.

(3) Cape is financially independent of Charter. Its consolidated asset value as of 1979 was $132,000,000, and its debt/equity ratio in that year was 43.6 percent. Cape has never borrowed from Charter, nor has Charter ever guaranteed a loan to Cape.

(4) There has never been significant overlap between the boards of Charter and Cape. The three directors Charter has nominated to the Cape board since 1969 have never constituted as much as 25 percent of the Cape board.

(5) Neither company trades upon or seeks identification with the other's name in its advertising or other dealings with the public.

(6) Charter has never been involved in the day-to-day management of Cape. It has never participated in decisions concerning the hiring and firing of Cape employees; portfolio investments; budgetary matters; advertising practices or marketing strategies; the organization, operation and structure of Cape subsidiaries; or the mining, marketing, prospecting or sale of asbestos.

(7) Cape was an established company in which Charter gradually acquired an interest which now stands at 67.3 percent; it is not a creation of Charter.

2. ***Pandrol***

Since 1965 Charter has owned, through a subsidiary, all the shares of Elastic Rail Spike, Ltd., an English corporation, which changed its name to Pandrol International in 1980. Pandrol International is engaged in the manufacture and sale of railway track fastenings and assemblies.

In 1975 Pandrol International established a sales office in Pittsburgh, Pennsylvania to market its product in the United States. The office was closed in 1978, and the company's authorization to do business in Pennsylvania was withdrawn. In 1978 Pandrol International formed and incorporated a wholly owned subsidiary, Pandrol, Inc., a Delaware corporation. Pandrol, Inc. established an office and built a manufacturing site in Bridgeport, New Jersey in 1979. Pandrol, Inc. both manufactures and markets railway fastenings and assemblies in the United States.

The independence of both Pandrol International and Pandrol, Inc. from Charter is demonstrated by the following factors:

(1) Both Pandrol International and Pandrol, Inc. maintain separate offices, books and records, and bank accounts from those of Charter.

(2) The boards of Charter, Pandrol International and Pandrol, Inc. meet separately.

(3) Charter does not have a majority of either Pandrol board; it nominates three directors to Pandrol International's eight member board, and makes no nominations to, and has no directors in common with, the board of Pandrol, Inc.

(4) Neither Pandrol International nor Pandrol, Inc. has any officers or employees in common with Charter.

(5) Charter has never participated in the day-to-day management of either Pandrol International or Pandrol, Inc. Neither company consults Charter about such decisions as the hiring, dismissal or promotion of employees; advertising practices; portfolio investments; marketing strategy; product innovation; technical developments; capital expenditures; or changes in corporate structure.

(6) Neither Pandrol company has ever traded upon, or sought identification with, Charter's name in its dealings with the public.

B. ***Charter's Contacts With Pennsylvania***

Charter conducts no business in Pennsylvania and is not qualified to do business there. It has never maintained an office, bank account, telephone listing, or post office box in the state. No Charter employees or officers reside in Pennsylvania, and the company has no distributors, suppliers, or agents there. Charter has never advertised or solicited business in Pennsylvania. The only time the company paid taxes in the state was in connection with a 1979 purchase of approximately $10,000 worth of stock through a Philadelphia stock broker.

With the exception of this purchase of securities, Charter's only contacts with Pennsylvania consisted of visits by employees of CCS, Charter's service subsidiary, on behalf of Charter's clients. CCS provides a variety of services for approximately 50 clients, including recruiting, secretarial, technical, buying, and share registration services. During the year preceding the filing of the complaint, CCS employees made the following visits in connection with services it provided for Charter's clients:

(1) A CCS employee met with employees of a Boyertown, Pennsylvania corporation in connection with the sale of columbite by a Charter client.

(2) A CCS employee met with employees of a Pittsburgh corporation to discuss the cancellation of orders for acid plant compressors placed by a Charter client located in Zaire.

(3) On behalf of another client, a CCS employee met in Pittsburgh with officials of the United States Bureau of Mines to discuss remote control devices.

(4) An authority on the properties of vanadium, employed by CCS, twice visited Pennsylvania on behalf of another Charter client, to discuss business with two Pennsylvania corporations and to promote the Vanadium International Technical Committee.

REASONS FOR GRANTING THE WRIT

In asserting jurisdiction over Charter, the Pennsylvania courts departed from two long established doctrines of this Court. First, they asserted jurisdiction over Charter, a foreign parent corporation, by virtue of the forum-related activities of two of its subsidiaries, Cape and Pandrol, even though Charter did not control, dominate, or otherwise involve itself in the business activities of either subsidiary. This conclusion constitutes a clear rejection of *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925).

Second, the Pennsylvania courts asserted as a separate basis of jurisdiction over Charter five isolated and unrelated visits to Pennsylvania by CCS employees. All such visits were unrelated to the cause of action. The courts concluded that such visits amounted to "continuous and substantial" business activity within the forum state. The conclusion that this level of activity constitutes "doing business" within a state for jurisdictional purposes is inconsistent with *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

I. THE PENNSYLVANIA COURT'S ASSERTION OF PERSONAL JURISDICTION OVER A FOREIGN PARENT CORPORATION ON THE BASIS OF THE FORUM-RELATED ACTIVITIES OF ITS SUBSIDIARIES, WHICH ARE SEPARATE AND DISTINCT CORPORATE ENTITIES, CONFLICTS WITH WELL-ESTABLISHED PRINCIPLES SET FORTH BY THIS COURT AND VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Pennsylvania courts asserted jurisdiction over Charter by ascribing to it the acts of two subsidiaries, Pandrol and Cape, both of which maintained contacts with Pennsylvania. In reaching this conclusion, the courts "pierced the corporate veils" of both Pandrol and Cape and found each to be the "alter ego" of Charter. In so doing, the Pennsylvania courts adopted a standard for "piercing the corporate veil" that is contrary to longstanding precedents of this Court and clearly violative of the due process clause of the Fourteenth Amendment. The Pennsylvania rule, if allowed to stand, will mean that any foreign parent corporation will be subject to the jurisdiction of the courts of a forum state solely by virtue of its subsidiary's presence in the forum.

In reaching this conclusion, the Pennsylvania courts rejected the authority of this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (Brandeis, J.). For nearly 60 years, *Cannon* has been the law throughout the United States on the issue of the susceptibility of foreign parent corporations to *in personam* jurisdiction.

In *Cannon*, the plaintiffs sought to obtain jurisdiction over the defendant in North Carolina by virtue of the activities of the defendant's subsidiary in that state. Plaintiffs demonstrated that the parent owned all of the capital stock of the subsidiary and that the parent dominated the subsidiary "immediately and completely." The subsidiaries' sole function was to market the parent's product, a function performed in other states by divisions of the parent corporation. Justice Brandeis,

writing for a unanimous Court, held that there was no jurisdiction over the parent in North Carolina. He noted that the separate existence of the subsidiary was "in all respects observed," *id.* at 335, and that "[t]he corporate separation, though perhaps merely formal, was real. It was not pure fiction," *id.* at 337.[2]

Federal and state courts have interpreted *Cannon* to hold that a court is justified in asserting jurisdiction over a foreign parent whose subsidiaries have contacts with the forum only if it can be demonstrated that the subsidiary is the "alter ego" or "mere instrumentality" of the parent. *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902, 905 (1st Cir. 1980); *Walker v. Newgent*, 583 F.2d 163, 167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Uston v. Hilton Casinos, Inc.*, 564 F.2d 1218, 1219 (9th Cir. 1977); *Wise v. State Bd. for Examination, Qualification & Registration of Architects*, 247 Ga. 206, 210, 274 S.E.2d 544, 547-48, *appeal dismissed*, 454 U.S. 804 (1981); *Westinghouse Elec. Corp. v. Super. Ct. of Alameda County*, 17 Cal. 3d 259, 274, 131 Cal. Rptr. 231, 242, 551 P.2d 847, 858 (1976); *Perlman v. Great States Life Ins. Co.*, 164 Colo. 493, 496-97, 436 P.2d 124, 125-26 (1968); *McCulloch Corp. v. O'Donnell*, 83 Nev. 396, 399, 433 P.2d 839, 841 (1967); *Bolger v. Dial-A-Style Leasing Corp.*, 159 Colo. 44, 48, 409 P.2d 517, 519 (1966); *Westerdale v. Kaiser-Frazer Corp.*, 6 N.J. 571, 575-76, 80 A.2d 91, 93 (1951). The courts that have applied the *Cannon* standard have analyzed a variety of factors in determining whether or not a subsidiary can fairly be deemed the alter ego of its parent.

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2 Among the decisions of this Court which contain conclusions similar to that of *Cannon* are the following: *Consolidated Textile Corp. v. Gregory*, 289 U.S. 85, 88 (1933) (the fact that the defendant corporation owned a subsidiary which was doing business in the forum was deemed "unimportant" for jurisdictional purposes); *People's Tobacco, Ltd. v. American Tobacco Co.*, 246 U.S. 79, 87 (1918) ("[t]he fact that the [defendant] company owned stock in the local subsidiary companies did not bring it into the State in the sense of transacting business there"); *Philadelphia & Reading Ry. Co. v. McKibbin*, 243 U.S. 264, 268 (1917); *Peterson v. Chicago, Rock Island & Pac. Ry. Co.*, 205 U.S. 364 (1907).

This analysis involves a careful weighing of the facts and close scrutiny of all aspects of the relationship between parent and subsidiary. Among the factors which courts have considered are the following: whether the parent and subsidiary maintain separate offices, *Reul v. Sahara Hotel*, 72 F. Supp. 995, 998-99 (S.D. Tex. 1974); separate bank accounts, *Schoel v. Sikes Corp.*, 533 F.2d 930, 932 n.3 (5th Cir. 1976); and separate books and records, *Frito-Lay, Inc. v. Procter & Gamble Co.*, 364 F. Supp. 243, 247 (N.D. Tex. 1973); whether board meetings and shareholders' meetings are conducted separately, *Indian Coffee Corp. v. Procter & Gamble Co.*, 482 F. Supp. 1098, 1104 (W.D. Pa. 1980); *Papercraft Corp. v. Procter & Gamble Co.*, 439 F. Supp. 1060, 1062 (W.D. Pa. 1977); whether parent and subsidiary have similar names, or make use of one another's names in dealing with the public, *Indian Coffee*, 482 F. Supp. at 1103; whether the subsidiary is financially independent of the parent, *Bland v. Kentucky Fried Chicken Corp.*, 338 F. Supp. 871, 875 (S.D. Tex., 1971); whether the parent and subsidiary have officers and directors in common, *Walker v. Newgent*, 583 F.2d 163, 167; *Priess v. Fisherfolk*, 535 F. Supp. 1271, 1278 (S.D. Ohio 1982); whether the existence of the subsidiary antedates its acquisition by the parent, *Delaware Valley Surgical Supply Co. v. Geriatric and Medical Centers, Inc.*, 450 Pa. 239, 244, 299 A.2d 237, 239 (1973); whether the parent has diverse stock holdings or is created solely as a holding company for the subsidiary, *Croyle v. Texas Eastern Corp.*, 464 F. Supp. 377, 379 (W.D. Pa. 1979); whether the parent dictates or controls the day to day business decisions of the subsidiary, *Turner v. Jack Tar Grand Bahama, Ltd.*, 353 F.2d 954, 956 (5th Cir. 1965); *Crow Tribe of Indians v. Mohasco Indus., Inc.*, 406 F. Supp. 738, 742 (D. Mont. 1975).

The Pennsylvania courts, however, did not undertake the careful analysis of the parent-subsidiary relationship that *Cannon* and the cases that follow it require. In concluding that Cape was the alter ego of Charter, the Pennsylvania Superior Court relied on only three points: that Charter owned over two

thirds of Cape's common stock; that Charter received approximately 16 percent of its income from Cape; and that the placement of Charter executives on the Cape board enabled Charter to participate in "Cape's important business decisions." Opinion of Montgomery, J., 464 A.2d at 328-29, App. B at 10a. Similarly, the Superior Court concluded that Pandrol was Charter's alter ego simply because Charter owned 100 percent of Pandrol International's stock and because Charter executives sat on Pandrol's board. *Id.* at 329, App. B at 10a-11a.

The Superior Court also made plain its disregard for the *Cannon* decision. The court stated:

> We find the reasoning of the Court in *Energy Reserves* [*Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kan. 1978)] to be logical and helpful, and direct the reader to that case, especially including its criticism of the holding in the *Cannon Manufacturing Co. v. Cudahy Packing Co.* case, supra. In *Energy Reserves* the Court found the assertion of jurisdiction in Kansas to be proper over a foreign corporation, based solely upon the business activities within the State of Kansas by a subsidiary that was a separate corporation. The Court explained the less stringent modern constitutional analysis in such cases mandated under the *International Shoe* decision.

Id. at 332, App. B at 16a-17a.

In citing the *Energy Reserves* decision, the Superior Court relied on a case that had explicitly rejected *Cannon*. The *Energy Reserves* court held that "while the rule of *Cannon*, and alter ego analysis generally, may in some situations retain statutory value, they no longer have any bearing on the constitutionality of jurisdiction over a defendant who is properly served." 460 F. Supp. at 495.[3]

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3 The Superior Court's reliance on *Energy Reserves* and its consequent rejection of *Cannon* is all the more remarkable because the *Cannon* decision had been explicitly adopted by the Pennsylvania Supreme

There is no merit to the Superior Court's suggestion that *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), undermined *Cannon*. Four years after the *International Shoe* decision this Court recognized the continued validity of *Cannon* in *National Carbide Corp. v. Comm'r of Internal Revenue*, 336 U.S. 422, 438-39 n.21 (1949). Although *International Shoe* and the cases that follow it require certain "minimum contacts" before jurisdiction can be imposed upon a foreign corporation, that decision does not define how that standard should be applied to a parent corporation that had no direct contacts with the jurisdiction. *International Shoe* itself involved a foreign corporation that had limited contact with the forum state; the question before this Court was whether such contact, although minimal, was sufficient so that the assertion of jurisdiction over the corporation did not offend due process. In *Cannon*, the question addressed was quite different: what relationship between a foreign parent and a domestic subsidiary would be sufficient to permit the assertion of jurisdiction over the parent. Nothing in *International Shoe*, either explicitly or by implication, undermines the authority of *Cannon*.

Because the Superior Court rejected *Cannon*, it undertook none of the factual analysis that *Cannon* and its progeny require. When the Charter-Cape and the Charter-Pandrol relationships are analyzed, it is immediately apparent that Charter's relationship with its subsidiaries is far less intimate than the parent-subsidiary relationship which *Cannon* and its progeny failed to find sufficient to confer jurisdiction over the parent. (A review of the relationships between Charter and its subsidiaries appears herein in the Statement of Facts, *supra*, at 4-7.) The Superior Court concluded that Cape was Charter's alter ego even though Cape is only 67.3 percent owned by Charter, with the balance of its shares publicly held. Our

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Court in *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965), and a federal district court in Pennsylvania had specifically declined to follow the *Energy Reserves* decision. *Beary v. Norton Simon, Inc.*, 479 F. Supp. 812, 815 (W.D. Pa. 1979).

research has revealed no other case in which a court "pierced the corporate veil" of a *partially held* subsidiary in order to assert jurisdiction over its majority shareholder.[4]

Under the Superior Court's test, any foreign parent corporation will be deemed the alter ego of a domestic subsidiary and thus subject to the jurisdiction of the forum state. By definition, a parent owns more than half of a subsidiary's stock, and it is rare that a parent does not have some representation on a subsidiary's board. The conclusion that a foreign parent corporation is subject to jurisdiction solely by virtue of a subsidiary's presence in the forum is troubling not merely because it represents a rejection of *Cannon* and 60 years of precedent. This decision, now apparently the law of Pennsylvania, if followed elsewhere, may act as a substantial disincentive to foreign investment in the United States. If the jurisdiction of the state courts is to be expanded in this fashion, it should be done only with explicit authorization after a thorough re-evaluation by this Court of the *Cannon* decision. It should not be based upon the decision of an intermediate state appellate court, relying principally upon the decision of a single federal district judge.

This Court has very recently emphasized that parent and subsidiary corporations must be seen as separate entities in jurisdictional determinations:

> [J]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned

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4 In applying the alter ego test in a similar asbestos case, the United States Court of Appeals for the Fifth Circuit refused to hold an English parent corporation liable for the torts allegedly committed by its wholly owned Pennsylvania subsidiary. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154 (5th Cir.), *reh'g denied*, Nos. 82-2231, 82-2236 (November 3, 1983). The Fifth Circuit noted that the parent had "complete authority" over the subsidiary's policy decisions, but was not subject to jurisdiction "merely because its subsidiary is present or doing business there." *Id.* at 1159, 1160.

> subsidiary. *Consol. Textile Co. v. Gregory*, 289 U.S. 85, 88 (1933); *Peterson v. Chicago, R. I. & P. Railroad Co.*, 205 U.S. 364, 391 (1907). Each defendant's contacts with the forum State must be assessed individually.

Keeton v. Hustler Magazine, Inc., No. 82-485, slip op. at 10-11 n.13 (U.S. March 20, 1984).

By similar reasoning, jurisdiction over a subsidiary does not automatically confer jurisdiction over the parent. That, however, is the inescapable conclusion of the Superior Court's opinion. Such a conclusion is fundamentally inconsistent with the due process clause of the Fourteenth Amendment. The mere ownership of a subsidiary does not rise to the level of "minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463." *International Shoe*, 326 U.S. at 316.

Traditional notions of corporate law, embraced by this Court in *Cannon* and followed for 60 years, have held that parent and subsidiary corporations are distinct entities, and cannot be considered as one for jurisdictional purposes unless certain well defined tests are met. The Superior Court's decision eroded that doctrine, and therefore has serious implications for every corporation, both foreign and domestic, that owns subsidiaries.

II. THE PENNSYLVANIA COURT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN IT FOUND THAT FIVE ISOLATED AND UNRELATED VISITS CONSTITUTED "CONTINUOUS AND SUBSTANTIAL" BUSINESS ACTIVITY SUFFICIENT TO SUBJECT CHARTER TO THE GENERAL JURISDICTION OF THE PENNSYLVANIA COURTS.

The Superior Court found another basis for jurisdiction over Charter. It concluded that five visits to Pennsylvania in the year preceding the filing of the complaint, plus the purchase of approximately $10,000 worth of stock through a Philadelphia brokerage house, amounted to a "continuous and substantial" course of business activity sufficient to subject Charter to the jurisdiction of the courts of Pennsylvania. The issue raised by this determination is already before this Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall, cert. granted*, 51 U.S.L.W. 3649 (March 8, 1983) (No. 82-1127): what level of activity is sufficient to establish jurisdiction over a foreign corporation when such activity is unrelated to the cause of action.

As the Statement of Facts sets out more fully (at 7-8, *supra*), Charter has had very little contact with the state of Pennsylvania. It was not qualified to do business there, and it maintained no offices, bank accounts, telephone listings, post office boxes, or mailing addresses in the state. None of its employees resided in Pennsylvania, and it had no distributors, suppliers or agents in the state. Nor had it ever solicited business in Pennsylvania.

The only contacts between Charter and Pennsylvania consisted of one purchase of securities, already noted, and five visits by employees of CCS, a Charter subsidiary, on behalf of Charter's clients. These visits were all unrelated to one another and completely unrelated to the cause of action. One visit was to discuss the sale of columbite; another was to discuss the cancellation of an order for equipment; the third was for discussions with officials of the U.S. Bureau of Mines. Two

other visits were made by an expert on vanadium. None of these visits involved purchases or sales of merchandise.

To assert jurisdiction over Charter based on these few contacts is clearly violative of the due process clause of the Fourteenth Amendment. Furthermore, it ignores the long line of authority in this Court that has drawn a sharp distinction between "general jurisdiction," which is based on a defendant's continuous and systematic activity within the forum whether or not related to the cause of action, and "specific jurisdiction," which is based on a defendant's acts within the forum out of which the cause of action arises.

The distinction between the two bases of jurisdiction has been recognized since *International Shoe*, 326 U.S. 310. In that case, this Court stated:

> "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. [Citations omitted]. *Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.* [Citations omitted]. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

Id. at 317. (Italics supplied.)

While relatively few contacts between the defendant and the forum might furnish a sufficient basis for jurisdiction with respect to a cause of action arising out of the defendant's in-state activities, a qualitatively different relationship is re-

quired where the cause of action did not arise out of the defendant's intrastate acts. Occasional visits do not furnish a basis for jurisdiction if, as here, they are not related to the cause of action.

The decision of this Court which has given most extensive consideration to the level of activity necessary to constitute "general jurisdiction" is *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437. In *Perkins*, the plaintiff brought an action in Ohio against a Philippine corporation for damages based on the failure to pay dividends and to issue certain stock certificates. Each omission occurred outside Ohio. The record revealed that the corporation was actively engaged in business operations in Ohio, where its president maintained an office, employed two secretaries, engaged in corporate correspondence, conducted directors' meetings, and maintained two active corporate bank accounts. Under these circumstances, this Court concluded that the defendant's contacts were sufficiently pervasive and substantial to permit the exercise of jurisdiction over a cause of action which did not arise from the activities conducted in the state.

The activities Charter conducted in Pennsylvania certainly do not rise to the level of activity in which the defendant engaged in *Perkins*. They are not even as extensive as the magazine sales in *Keeton v. Hustler Magazine Inc.*, No. 82-485, slip op. at 8, which this Court suggested were probably not "so substantial as to support jurisdiction over a cause of action unrelated to those activities." Charter's visits obviously do not amount to a "continuous and substantial" course of business activity sufficient to constitute a general jurisdictional presence in Pennsylvania. To hold otherwise, as the Superior Court did, is to disregard the entire line of authority that begins with *International Shoe*. Such a holding does not comport with due process and should not be upheld.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the Supreme Court of Pennsylvania.

Dated: March 26, 1984

Respectfully submitted,

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APPENDICES

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CARL RICE, ESQ.
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219

January 4, 1984

Michael R. Bucci, Jr., Esquire
Thorp Reed & Armstrong
One Riverfront Center
Pittsburgh, Pa. 15222

In Re: Charter Consolidated LTD, Charter Consolidated Investments, et al. v. Anthony A. Barber, et al. No. 264 W. D. Allocatur Docket, 1983

Dear Mr. Bucci:

The Court has entered the following Order on your Petition for Allowance of appeal filed in the above-captioned matter:

"27 December 1983
Petition denied.
Per Curiam"

Very truly yours,

/s/ Carl Rice
Carl Rice, Esq.

CR:bnl
cc: Stanley W. Greenfield, Esq.
Gerald C. Paris, Esq.
George E. McGrann, Esq.
Edmund L. Olszewski, Jr., Esq.
Brian Baxter, Esq.
Larry P. Gaitens, Esq.
George Cohen, Esq.
Richard A. Colasurd, Esq.
Hon. I. Martin Wekselman

Appendix B

ANTHONY A. BARBER, et al.,

v.

PITTSBURGH CORNING CORPORATION, et al.,

v.

COMMONWEALTH of Pennsylvania and
American Flint Glass Workers
Union, AFL-CIO.

Appeal of CHARTER CONSOLIDATED LTD.,
Central Mining Finance, Ltd., and
Charter Consolidated Investments Ltd.

Superior Court of Pennsylvania

Argued Jan. 13, 1983.

Filed July 1, 1983.

Reargument Denied Sept. 13, 1983.

Werner Polak, Pittsburgh, for appellants and William M. Wycoff, Pittsburgh, submitted a brief, for appellants.

Stanley W. Greenfield, Pittsburgh, submitted a brief, and George Cohen, Pittsburgh, for Barber et al., appellees.

George Edward McGrann, Pittsburgh, for PPG, appellee.

Before POPOVICH, MONTGOMERY and VAN der VOORT, JJ.

MONTGOMERY, Judge:

The instant appeal arises from the lower court's denial of preliminary objections which challenged the *in personam* jurisdiction of the Pennsylvania courts over a foreign corporation named as a defendant in the action. After denying the preliminary objections, the trial court certified, pursuant to Rule 311(b)(2) of the Pennsylvania Rules of Appellate Procedure, that a substantial issue of jurisdiction was presented, and the matter is therefore properly before us for resolution at this time. The issues involved have been the subject of thorough briefs, and oral argument was expertly presented before us by counsel for the respective parties.

The instant case was commenced in August, 1979, by the filing of a Complaint in trespass and assumpsit in the Court of Common Pleas of Allegheny County. The plaintiffs comprise current and former employees of the Pittsburgh Corning Corporation (hereinafter "Pittsburgh Corning") and spouses of such employees. The spouses' claims are for loss of consortion. The substance of the plaintiffs' action is a claim that the plaintiff employees contracted asbestosis, a serious respiratory disease, as a result of their exposure to asbestos dust and fibers in the course of their employment at Pittsburgh Corning's Port Allegheny Pennsylvania plant. The plaintiffs sought recovery from two general classes of defendants. The first class includes Pittsburgh Corning, Pittsburgh Plate Glass (hereinafter "PPG") and Corning Glass Works, Inc. (hereinafter "CG"), the latter two defendants being joint owners of Pittsburgh Corning. It was generally alleged by plaintiffs that this first class of defendants was either directly or indirectly responsible for the conditions of the employment in which the employee plaintiffs suffered their alleged exposures to asbestos. The second broad class of defendants included Charter Consolidated, Ltd. (hereinafter "Charter"), the Appellant on this appeal[1], and various corporate entities which the parties re-

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1 Charter Consolidated Investments, Ltd. and Central Mining Finance, Ltd. which are both subsidiaries of Charter, also filed preliminary objections in the lower court, on jurisdictional grounds, and both

ferred to as the Cape Industries Group or Cape Industries, Ltd. We shall hereinafter refer to these defendants collectively as "Cape", unless a more specific designation of a particular Cape constituent party becomes particularly relevant and requires separate identification. This second general group of defendants was alleged to have been directly or indirectly involved in the mining and sale of asbestos to Pittsburgh Corning. The members of the first class of defendants have each appeared in the lawsuit to defend against the merits of the claims asserted by plaintiffs. As to the second class of defendants, the record shows no appearance in the case by Cape. Charter entered an appearance in the case and then filed its preliminary objections to the Complaint, seeking to have the action dismissed for lack of *in personam* jurisdiction as to Charter.

The lower court postponed a decision on Charter's preliminary objections and allowed the parties discovery with respect to the jurisdictional question presented. Following the termination of discovery, the lower court held a hearing and accepted briefs from the parties. Finally, the lower court overruled Charter's preliminary objections, and the instant appeal was filed. The basic question presented by this appeal is whether Charter, a foreign corporation, is subject to *in personam* jurisdiction in the courts of our Commonwealth.

In our analysis of this appeal, we will of course be concerned with the factual basis underlying the lower court's assertion of jurisdiction over Charter in this case. However, it is initially appropriate that we review the law which governs the questions of *in personam* jurisdiction over a foreign corporation which are presented by this appeal.

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have appeared before our Court as co-appellants with Charter in the instant appeal. The record shows that both of the subsidiaries were administrative tools used by Charter to hold the stock of Cape. No separate arguments are offered on this appeal on behalf of either of the subsidiaries. Accordingly, all of the discussion in this Opinion as to Charter should be understood to refer to Charter Consolidated Investments, Ltd. and Central Mining Finance, Ltd. as well.

The first reference to authority requires that attention be directed to the statutory provisions which provide for the jurisdiction of the Pennsylvania Courts over a foreign corporation. The so-called "long-arm" jurisdictional statutes were amended by our legislature in 1972, and such amendments were clearly intended to liberalize a somewhat restrictive Pennsylvania jurisdictional view which existed prior to that time. *Garfield v. Homowack Lodge, Inc.*, 249 Pa.Super. 392, 378 A.2d 351 (1977). In reviewing the history of Pennsylvania practice under long-arm rules in 1974, our Court recognized that the 1972 amendments to the long-arm statute were designed to ". . . remove all Pennsylvania statutory and, therefore, decisional impediments to the exercise of *in personam* jurisdiction over foreign corporations." See *Proctor & Schwartz, Inc. v. Cleveland Lumber Company*, 228 Pa.Super. 12, 17, 323 A.2d 11, 14 (1974). The Court, in the same case, noted that: "The statute reinforced through express language the judicially stated public policy of Pennsylvania to extend *in personam* jurisdiction 'to the full measure consistent with due process standards'." (citations omitted) 228 Pa.Super. at 17, 323 A.2d at 14.

The Act of November 15, 1972, as amended, is now set forth, in parts pertinent to the issues presented in this appeal, in 42 Pa.C.S.A. §§ 5301 and 5322. These provisions establish jurisdiction over foreign corporations along two separate approaches. Section 5301 provides for jurisidiction over such an entity that conducts "a continuous and systematic part of its general business within [the] Commonwealth", whether or not the particular cause of action asserted arises "from [the] acts" on which jurisdiction is based.[2] Section 5322, especially in

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2 Section 5301 provides, in pertinent part:

> (a) General rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:
>
> * * * * * *

subsection (b), establishes jurisdiction over foreign corporations based upon acts from which the claims of the plaintiff arise. This statutory provision specifically asserts that the jurisdiction of our courts "to the fullest extent allowable under the Constitution . . . [may be] . . . based on the most minimum contact with this Commonwealth allowed under the Constitution."[3]

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(2) Corporations.—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

* * * * * *

(b) Scope of jurisdiction.—When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated, in this section. Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) and (a)(3)(i) and (iii) shall not affect jurisdiction or omission occurring during the period such status existed.

3 Section 5322, provides more fully, in pertinent part:

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

* * * * * *

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

With respect to the subject of *in personam* jurisdiction over unregistered foreign corporations, we have recognized that the change in policy represented by the 1972 legislative amendments to our "long-arm" statute was merely coexistent with the evolution of substantive jurisdictional due process expressed by the United States Supreme Court. Certainly the landmark modern decision of that Court in this area was the famous case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102(1945), where the Court stated:

> "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."

This "minimum contracts" analysis is one our courts have followed since the issuance of the *International Shoe* decision.[4]

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(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

* * * * * *

(b) Exercise of full constitutional power over nonresidents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

* * * * * *

4 It has been recognized that the current Pennsylvania long-arm legislation, discussed above, ". . . tracks the two jurisdictional theories defined by the Court in *International Shoe*." See *Strick Corp. v. A.J.F. Warehouse Distributors, Inc.*, 532 F.Supp. 951, 955 (E.D.Pa. 1982).

However, we cannot ignore subsequent explanations of minimum constitutional requirements for the assertion of *in personam* jurisdiction, such as the Court's declaration in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958): "[I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Also, we cannot forget the requirement that the plaintiff's cause of action must arise from activities within the forum state by the proposed defendant. See *Garfield v. Homowack Lodge, Inc.*, supra.

In summarizing all of these concepts, our Court has established a two step test for determining whether the exercise of this state's jurisdiction over a particular defendant was constitutional. It was restated not long ago in *Koenig v. International Brotherhood of Boilermakers*, 284 Pa.Super. 558, 568, 426 A.2d 635, 640 (1980):

> "First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws . . . Secondly, the cause of action must arise from defendant's activities within the forum state . . . Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable . . .
>
> If it appears that this test is not satisfied, the second step is to decide whether the non-resident defendant's activities in Pennsylvania unrelated to the cause of action were 'continuous and substantial.' " (citations omitted).

With these legal concepts in mind, it is next appropriate that we review the record for facts germane to the jurisdictional issue presented. The record established that Charter is an English corporation engaged generally in a variety of commercial transactions primarily in the fields of mining, manufacturing and finance. Its mining operations involved mostly

minerals from Africa. Its manufacturing, through various subsidiaries to be more particularly discussed below, includes asbestos insulation and building products, mining equipment and railroad track fasteners. Its financial operations include investments in other commercial entities, such as mining companies. Charter also often acts as a business agent for other companies in various fields.

Charter may best be described, in general, as a holding company, which conducts virtually all of its business through wholly owned or majority owned subsidiaries. These subsidiaries are within Charter's four main divisions, which are Mining, Industrial, Finance and Administration and Services. Thus, for instance, Charter's headquarters staff, including executives, are formally employed and paid by a wholly owned subsidiary.

Charter's Industrial Division is not a department of the type one might envision in a more typical business entity, but actually consists of a collection of subsidiaries, including two groups of companies which are significant in the instant case because of their involvement in business transactions in Pennsylvania. These are Cape and the Pandrol Group. The record shows clearly that Charter conducts the affairs of its Industrial Division by exercising control over the operations of its industrial subsidiaries.

As noted, the transactions of Cape are highly significant in the resolution of the jurisdictional issue presented by this appeal. While Charter sought to divorce itself from Cape and to depict it as an almost unrelated entity, the record clearly refutes such a position. It shows that Cape is a principal operating subsidiary of Charter which has provided 16.9% of Charter's income, according to answers to interrogatories. This income was derived from Cape's involvement as the owner of asbestos mines in South Africa. Of greatest import in this case has been the business involved in Cape's sales, between 1964 and 1972, of thousands of tons of asbestos to Pittsburgh Corning for use at the Port Allegheny Pennsylvania facility where the Plaintiffs have been employed. The lower court in this case noted in its opinion that the parties stipulated to the

jurisdiction of the Pennsylvania courts over Cape, which is clear under 42 Pa.C.S.A. §§ 5322.

Charter maintains that its relationship with Cape is not such that Cape's business transactions in Pennsylvania should be significant in supporting the *in personam* jurisdiction of the Pennsylvania courts over Charter. However, although Cape may technically appear to be an independent business entity, the record shows clearly the extent to which it comprises an operating arm of Charter. As mentioned earlier, it has produced over one-sixth of Charter's income. Charter in fact is the owner of over two-thirds of the common stock of Cape and has acquired all of its preferred shares. In the course of its purchase of such firm control of Cape over several years, Cape announced the following in a prospectus accompanying its offer to buy fifty percent of all then outstanding shares:

> "It is Charter's purpose to make use of the wide experience of Cape's management so that Cape can become the main channel for the expansion of Charter's industrial activities of this type; this could not be satisfactorily achieved unless Charter acquired a considerably larger holding such as would give Charter control of Cape."

The record makes it clear that since it acquired such a substantial ownership of Cape, Charter has been well represented by its own executives placed on Cape's Board of Directors, and has thereby participated in Cape's important business decisions. This total involvement by Charter in Cape's affairs was clearly significant to the lower court in its finding that through Cape, Charter has engaged in business affairs in Pennsylvania to a degree sufficient to assert *in personam* jurisdiction over Charter.

Also significant to the same conclusion was Charter's relationship to the Pandrol Group, and the Pennsylvania business transactions of Pandrol. There is no question that the Pandrol Group has engaged steadily in business affairs in our Commonwealth. Pandrol International, Ltd., which is wholly owned by Charter, and Pandrol, Inc., wholly owned by Pandrol International, Ltd., have manufactured and sold various

types of railroad track equipment. For many years prior to the filing of the instant suit, they have sold this equipment themselves or through an entity known as United Rail Anchor, located in Pittsburgh. Pandrol International, Ltd. was not only registered to do business in Pennsylvania from 1975 through 1978, but paid taxes and even maintained a bank account in our State.

There appears to be no dispute of the conclusion that the Pandrol Group has been actively engaged in business in Pennsylvania to the extent that it is subject to the *in personam* jurisdiction of our courts.[5] Although Charter again seeks to segregate itself from Pandrol in the face of this jurisdictional problem, the facts simply do not support Charter's position. It is clear that Pandrol is not an independent entity, even if set up as a separate business corporation under the law. Rather, it is clearly a business division of its corporate owner, which controls all of its operations. Charter does this not only through its total ownership of Pandrol but also through placement of its executives on Pandrol's Board of Directors. Charter dictates Pandrol's policies just as another business entity would control the activities and directions of one of its operating divisions. It simply cannot be realistically maintained that Charter and Pandrol are, in substance, independent entities.

In addition to the evidence in the record as to the activities of Cape and Pandrol, the record also contains evidence of direct participation in Pennsylvania business transactions by Charter representatives and employees. In the course of discovery in this case. Charter refused to supply information about such contacts with our Commonwealth occurring more than one year prior to the filing of this suit. Nevertheless, while so limiting its responses, Charter still disclosed several significant individual business forays into our Commonwealth by its employees. Some of these contacts were of extended duration, and involved meetings, sales, technical consultations, business planning and even a securities transaction.

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5 42 Pa.C.S.A. § 5301 clearly applies as to Pandrol.

More specifically, the record shows that during an eight month period in 1979, Charter sold columbite to a customer in Boyertown, Pennsylvania. These sales were made on behalf of one of Charter's clients from Nigeria. In connection with that transaction, Charter's manager of metals sales in its Mining Division met in June, 1979, in Pennsylvania, with representatives of the customer. In another case, a different Charter representative, from its Mining Division, met in Pittsburgh in April, 1979, with Pennsylvania customers to discuss orders for acid plant compressors. The supplier in that case was a Charter client situated in Zaire. Similarly, during the same month, a third Charter representative met in Pittsburgh with representatives of the U.S. Bureau of Mines, to discuss remote control devices manufactured by another Charter client. In still another transaction, a different Charter employee, Dr. Sage, met in Pittsburgh in November, 1978 and again in March, 1979 with representatives of U.S. Steel and some from Foote Minerals Company, for the purposes of discussing transactions involving business and research projects. During 1979, Charter's Finance Division purchased 3000 shares of stock through a Philadelphia stock brokerage. Such activities by Charter agents, during the limited period covered by Charter's responses in discovery, were also considered by the lower court to lend weight to the conclusion that Charter should be subjected to the *in personam* jurisdiction of our Courts, under 42 Pa.C.S.A. § 5301.

After thorough consideration of the record as a whole, we conclude that the lower court was correct in its determination on the *in personam* jurisdiction issue presented in this case. We find that Charter's involvements in Pennsylvania satisfy the tests set forth in *Koenig v. International Brotherhood of Boilermakers*, supra., and other cases so that an assertion of Pennsylvania court jurisdiction over Charter is clearly constitutional. More particularly, we first find it evident that Charter has purposely availed itself of the privilege of acting within Pennsylvania and thus invoked the benefits and protections of our laws. Charter did this constantly and repeatedly over the years preceding the filing of this suit in its conduct of recurring

business affairs through its Cape and Pandrol operations as well as the individual acts of various representatives. The second requirement, that the cause of action must arise from the defendant's activities within the forum state, is clearly satisfied. In light of the allegations of the Plaintiffs' Complaint, this occurred in its sale of asbestos to their employer. The third requirement is that the acts of Charter must have been substantial enough with regard to Pennsylvania so that our courts' exercise of jurisdiction over Charter is reasonable. Again, there is no question that the activities of Charter, through Cape, Pandrol and various individual representatives, has been both continuous and substantial in Pennsylvania. The extent of these commercial transactions makes the assumption of jurisdiction completely reasonable and proper in this case.

Some mention of the contentions raised by Charter is appropriate. Charter contends that under the holdings of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634 (1925) and *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965), it cannot be subjected to the jurisdiction of Pennsylvania courts because Cape and Pandrol comprise independent corporations, not subject to Charter's direction and control. We find that Charter's reliance upon these precedents is misplaced in light of the facts produced before the lower court in this case. Moreover, we find that the modern trend in decisional law lends further weight to the conclusion that jurisdiction was properly asserted over Charter in this case. In *Cannon*, the Supreme Court held that a Maine corporation could not be subjected to the jurisdiction of the courts of North Carolina despite its ownership of all of the capital stock of another corporation which was engaged in business affairs in North Carolina. The Court, in an opinion by Justice Brandeis, refused to ignore the separate formal corporate existence of each company. While the Supreme Court respected the separate incorporation of the subsidiary, it is noteworthy that it specifically declared that its ruling should not be taken as having uniform application: "(S)uch use of a subsidiary does not *necessarily* subject the

parent corporation to the jurisdiction" of North Carolina. (emphasis supplied) 267 U.S. at 337, 45 S.Ct. at 251. In *Botwinick*, our Pennsylvania Supreme Court, relying in part upon *Cannon*, held that a New York corporation was not "doing business" within Pennsylvania even though it had a subsidiary which was a Pennsylvania corporation. The Court found that the subsidiary, which had a separate corporate existence, was not a mere instrumentality of the New York corporation. While reaching that conclusion upon the facts presented in that case, the Court in *Botwinick* nevertheless acknowledged that a subsidiary's activities might well cause its parent to become subject to the jurisdiction of the courts in a state where the subsidiary was engaged in business activities:

> "There is a well recognized exception to these general rules if the record demonstrates that the subsidiary is the "alter ego" of the parent to the extent that domination and control by the parent corporation renders the subsidiary a mere instrumentality of the parent; under such extreme circumstances the parent corporation may be held to be doing business within the state under the facade of the subsidiary."

The lower court in the instant case determined, under the standards of *Botwinick*, and the facts of record, that Charter's control over both Pandrol and Cape was of a sufficient degree to consider each but an instrumentality of Charter. We agree with such conclusions. It cannot be forgotten that Charter is itself only a holding company which has chosen to perform all its business functions through operational arms that happen to be set up legally as separate corporations. Despite such separate incorporation, Charter's total control over Cape and Pandrol is so clear, that to reach any other conclusion in this case would be to blindly exhault form over substance. Charter itself has made these separate corporations constituent parts of its various operating divisions. As explained at length by the lower court, Charter has retained and exercised full control over these subsidiaries through their Boards of Directors. We agree that the degree of control, of both Cape and Pandrol, is

sufficient for the proper assertion of Pennsylvania jurisdiction over Charter, even based upon the pronouncements of the *Botwinick* court.

Charter's arguments as to a lack of an *alter ego* relationship, and reliance upon *Botwinick*, ignore other factors in the case. These involve the activities of Charter's own employees, for various commercial purposes, in our Commonwealth in the year prior to the filing of this suit. It is clear that the lower court was justified in finding that these activities constituted "a continuous and systematic part of its general business" of sufficient magnitude to make it fair and reasonable to exercise jurisdiction over Charter under 42 Pa.C.S.A. § 5301. We do not have any particular mechanical rule which we follow in these cases, but must determine on an *ad hoc* case by case basis whether the "minimum contacts" of a foreign corporation have been sufficient to justify the assumption of jurisdiction over it by our courts. *Proctor & Schwartz, Inc. v. Cleveland Lumber Company*, supra. The analysis of the substantiality of the business transactions conducted cannot depend on any comparative dollar volume test involving the defendant's total sales volume, as such a ratio test would invariably favor the multimillion dollar corporations over those with smaller sales volumes. *Hendrickson v. Reg O Co.*, 657 F.2d 9, 12-13 (3rd Cir.1981). It has been stated that the proper inquiry is whether the defendant's "conduct and connection with [the state] are such that [it could] reasonably anticipate being haled into court" there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). We find that Charter's own business contacts in our Commonwealth justify the assertion of jurisdiction over it, even without regard to the evidence of domination and control of its subsidiaries which are clearly engaged in business in our State.

This conclusion is mandated by the record, which demonstrates that even within the limited period of time for which it submitted responses in discovery, Charter's own business contacts with our State were quite diverse in nature, and broad in scope. The record shows that in a single twelve month period, several different Charter representatives, from at least three of

its separate operating divisions, visited our Commonwealth for business transactions. These direct business involvements by Charter were not limited to a single customer or business project, but included five separate Pennsylvania based customers or concerns, and dealt with matters as diverse as sales of minerals, acide plant compressors, and remote control devices, and other business projects and research endeavors. Further, during the same limited time period about which it made disclosures, Charter was not only a seller, but also purchaser, obtaining 3000 shares of stock in a transaction through a Philadelphia broker. Based upon these transactions, all within the year prior to the filing of this suit, we find no merit in Charter's claim that it had not itself engaged in business in our Commonwealth sufficient to justify the assertion of jurisdiction by our courts.

Earlier, we had noted that the modern trend in judicial thought would favor the assertion of jurisdiction over Charter in this case. The modern cases, of course, rely upon the *International Shoe Co. v. Washington* "minimum contacts" type of analysis. The lower court cited the case of *Energy Reserves Group v. Superior Oil Co.*, 460 F.Supp. 483 (D.C.Kan.1978) as an instructive case on the question of whether a parent corporation may be subjected to the jurisdiction of a state's courts solely because of the activities of its subsidiaries within that state. We find the reasoning of the Court in *Energy Reserves* to be logical and helpful, and direct the reader to that case, especially including its criticism of the holding in the *Cannon Manufacturing Co. v. Cudahy Packing Co.* case, supra. In *Energy Reserves* the Court found the assertion of jurisdiction in Kansas to be proper over a foreign corporation, based solely upon the business activities within the State of Kansas by a subsidiary that was a separate corporation. The Court explained the less stringent modern constitutional analysis in such cases mandated under the *International Shoe* decision. We believe the "minimum contracts" analysis, and a recognition of the commercial reality of Charter's domination and control of Cape and Pandrol, make

it clear that Charter is subject to the jurisdiction of our Pennsylvania courts.

Finally, we note that it is well-established as a rule that when preliminary objections, if sustained, would result in the dismissal of an action, such objections should be sustained only in cases which are clear and free from doubt. *Botwinick v. Credit Exchange, Inc.*, supra. Moreover, when deciding a motion to dismiss for lack of personal jurisdiction the court must consider the evidence in the light most favorable to the non-moving party. *Lieb v. American Pacific International, Inc.*, 489 F.Supp. 690, 694 (E.D.Pa. 1980). With these concepts in mind, it is clear that no basis exists in the instant case to disturb the findings of the lower court on the question of jurisdiction presented.

The order of the lower court denying preliminary objections is affirmed, and the case is remanded for further proceedings. Jurisdiction is not retained.

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

ANTHONY A. BARBER, et al.

v.

PITTSBURGH CORNING CORPORATION, et al.

v.

COMMONWEALTH OF PENNSYLVANIA and AMERICAN FLINT GLASS WORKERS UNION, AFL-CIO

APPEAL OF CHARTER CONSOLIDATED LTD., CENTRAL MINING FINANCE, LTD., and CHARTER CONSOLIDATED INVESTMENTS, LTD.

NO. 139 PITTSBURGH 1982

ORDER

AND NOW, this 1st day of JULY , 1983, it is ordered as follows:

__X__ Order Affirmed and case remanded for further proceedings.

_____ Order Reversed and Case Remanded with instructions.

_____ Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

_____ Order Modified as set forth in opinion filed herewith.

_____ Ordered as set forth in opinion filed herewith.

_____ Costs to be taxed as provided by Chapter 27 of the Pa. R. A. P.

_____ Costs to be taxed as provided in opinion filed herewith.

_____ Judgment of Sentence Affirmed.

_____ Appeal Quashed.

BY THE COURT

/s/ Irma T. Gardner
Deputy Prothonotary

NOTE: Unless another date is hereinafter set forth, the foregoing Order was entered on the docket on the date set forth above. Ordered entered: _____

Appendix C

IN THE
COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ANTHONY A. BARBER, et al.
Plaintiffs,
v.

PITTSBURGH CORNING CORPORATION, et al.,
Defendants,
v.

COMMONWEALTH OF PENNSYLVANIA; and AMERICAN FLINT GLASS WORKERS UNION, AFL-CIO
Additional Defendants.

CIVIL DIVISION

G.D. No. 79-21544

Issue No:

Code 009—Trespass/Other

OPINION and ORDER OF COURT

Filed by:
WEKSELMAN, J.

December 31, 1981

COPIES OF THIS OPINION AND ORDER OF COURT MAILED TO:

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BRYAN BAXTER, ESQ.

DR. RICHARD GAZE, Defendant
CENTRAL MINING FINANCES, LTD., Defendant
MR. GEOFRY HIGHAM, Defendant
CAPE BOARD AND PANELS, LTD., Defendant
PTY, LTD., Defendant
CAPE INDUSTRIES, LTD., Defendant
CAPE ASBESTOS INDUSTRIES, LTD., Defendant.

OPINION

I. MARTIN WEKSELMAN, J. December 31, 1981

The issue presented in this case is whether this court can exercise jurisdiction over a foreign corporation through the activities of its subsidiaries in this Commonwealth. It is the opinion of this court that such jurisdiction does exist.

Defendant PPG Industries, Inc. (hereinafter "PPG") and defendant Charter Consolidated, Ltd. (hereinafter "Charter") have taken widely divergent approaches to the issue. PPG urges this court to look at the economic and commercial realities of the parent-subsidiary relationship of today's multinational corporations. It is its contention that such a corporation should be viewed as a single economic entity wherein it is the parent company which ultimately benefits from the subsidiaries' activities in this forum. Charter contends that the more traditional approach of looking for control of the subsidiary by the parent should be followed.

After careful consideration, the court concludes that PPG's approach cannot be followed on the facts presented here. PPG has cited several persuasive cases involving examination of the overall parent-subsidiary relationship. The facts of those cases, however, are so distinguishable from those here that the rationale and holdings cannot be followed.

Crucible v. Stora Kopparbergs Bergslags AB, 403 F. Supp. 9, (W.D. Pa., 1975), involved a Swedish steel corporation parent and an American subsidiary. The subsidiary purchased steel from its parent and sold it in Pennsylvania. Through another subsidiary, and using the same format, paper products were shipped into this Commonwealth.

The court held that the parent corporation was subject to Pennsylvania jurisdiction. The court did not believe it was within the contemplation of the concepts of fairness and due process to allow a manufacturer to insulate itself from the courts of this state by using an intermediary to sell its products, or by professing ignorance of their ultimate destination. *Id.* at 12. The court found that the American subsidiary was merely a conduit for the parent's product.

Similarly, the court in *Bulova Watch Co. v. Hattori*, 508 F. Supp. 1322 (E.D.NY 1981), looked at the cumulative effect of all the foreign parent's activities in New York to determine whether it was doing business there. The court placed particularly great weight on the American subsidiary's being the sole outlet for the parent which was a producer of an extremely limited number of products. The court believed that a key test for finding an alter ego relationship was whether the subsidiary's presence in the forum was a substitute for the parent's. *Id.* at 1342. It was the court's conclusion that the subsidiary was a mere substitute. If it did not advertise, provide service and quality control centers, or develop marketing techniques, the parent would have. *Id.* at 1344.

The facts of the case at bar, however, are altogether different. Charter is a highly diversified corporation. Its subsidiaries are not the marketing arm of a parent manufacturer. Charter is a holding company and manufactures nothing, although it has investments in companies that do. Cape Asbestos, Ltd. (hereinafter "Cape"), Pandrol International, Ltd. and Pandrol Incorporated manufacture and market their own products and are not conduits for Charter's products. Thus, the rationale of *Crucible* and *Bulova* is not applicable to the instant case. Therefore, the traditional approach espoused by Charter will be applied.

On the basis of the facts presented by both parties, the court concludes that this court has jurisdiction over Cape, Pandrol International, and Pandrol Incorporated. The parties have stipulated to this court's jurisdiction over Cape.

Jurisdiction over Pandrol International, Ltd. exists by virtue of 42 Pa.C.S. §5301(a)(2)(iii) and 15 P.S. §2011(c). By virtue of its contract with Unit Rail Anchor, Pandrol did business in this Commonwealth. Under the terms of this contract, URA acted as Pandrol's sales agent for the sale of rail clips, tie plates, cast shoulders, and insulators from 1969-74. URA's offices were in Pittsburgh. Jurisdiction over Pandrol is also established by its having been registered to do business in Pennsylvania from 1975-78 (§5301(a)(2)(i). In addition, Pandrol maintained a bank account and paid taxes in this Commonwealth.

Pandrol, Inc. is also subject to the jurisdiction of this court. Since its formation in 1978, Pandrol Incorporated has had such significant contacts with Pennsylvania as to constitute its carrying on "a continuous and systematic part of its general business" here. §5301(a)(2)(iii). In addition to being "continuous and systematic," Pandrol Incorporated's contacts with this forum have been substantial, thereby making our jurisdiction over it reasonable and satisfying the requirements of due process. *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *Goff v. Armbrecht Motor Truck Sales Inc.*, ____ Pa. Super. ____, 426 A.2d 628 (1980).

Pandrol Incorporated manufactures and sells rail fastening clips which it manufactures in its New Jersey plant. Since 1979 it has sold approximately 5,000,000 clips, 200,000 of which were to railroads in Pennsylvania. Testimony indicates the clips sold in this Commonwealth would cover 15-17 miles of track. While it may be contended that Pandrol's sales in this Commonwealth were insubstantial, "the test of substantiality . . . does not depend upon a comparison with the defendant's total sales . . . [S]ubstantiality . . . must be mreasured by objective factors . . . The volume of sales here, although slight in terms of its percentage of total sales, were not isolated or exceptional occurrences, but were part of a regular course of dealing." *Hendrickson v. Reg O Company*, No. 80-2751, slip op. at 5-6. (3rd Cir. filed Aug. 3, 1981). Moreover, . . . "[t]he fact that the sales and other contacts are not expansive is simply a reflection of the reality that the jurisdiction itself is a small one, and market demands may not be great." *Id.* at 11.

Further testimony indicates these sales were to eight of Pandrol Incorporated's seventeen major customers: Amtrak, Bessemer and Lake Erie Railroad, Chessie System, Conrail, Monongahela Connecting Railroad, Pittsburgh and Lake Erie Railroad, SEPTA, and Union Railroad. Pandrol dealt with the Bessemer through its Greenville, Pa., office, the P & LE through its Pittsburgh headquarters, and Amtrak in Philadelphia. It also knew the other customers were owned by Pennsylvania corporations and conducted their business in this state. It is apparent to this court that Pandrol has undertaken

"purposeful activity intended to preserve and enlarge an active, though small, market . . ." in Pennsylvania. *Id.* at 11.

Another major contact between Pandrol Incorporated and Pennsylvania was its purchase of steel from Bethlehem Steel Corporation. Although no monetary amounts were stated with respect to these sales, it is known that Bethlehem Steel required guarantees from Pandrol. These guarantees came from Central Mining Finance, a wholly owned Charter subsidiary, ($500,000), and Charter ($850,000). [Schumaker Dep. p. 71.]

Pandrol Incorporated also had other contacts with Pennsylvania. For example, it had another contract with Bethlehem Steel for steel tie plates manufactured in Steelton, Pa. Those were shipped directly to the railroads upon Pandrol placing an order. A similar contract existed between Pandrol and Precise Metals and Plastics, located in Pittsburgh, for insulators used by the railroads in conjunction with Pandrol's products. Again, Pandrol placed the orders. Additional contracts existed between Pandrol and U.S. Steel, Roebling, and Crucible for steel manufactured in Pennsylvania, and Pandrol retained a Philadelphia law firm as their attorneys.

In light of the facts just presented, it cannot be seriously contended that Pandrol did not have substantial contacts with this Commonwealth or that it did not carry on a continuous and systematic part of its general business here. Although it may be argued that defendant's contacts when taken separately are insufficient to confer jurisdiction over Pandrol, its conduct and derivation of benefits from activities in this Commonwealth are sufficient cumulatively to establish a jurisdictional presence. *Hendrickson*, *supra*, at 5. Due process merely requires that defendant's contacts be such that it would be reasonable to hold it accountable in our courts. By purposely availing itself of the benefits and protections of our laws through dealing with local corporations, Pandrol must have had some notion that it might someday be haled before our courts *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980).

The determination of whether Charter can be held accountable in our courts because of the conduct of its subsidiaries

must, as stated earlier, be determined under what Charter denotes as the "traditional concepts of jurisdiction" as first set forth in *Cannon Manufacturing Co. v. Cudahy Packaging Co.*, 267 U.S. 333, 45 S.Ct. 250 (1925). In that case, Justice Brandeis refused to hold that a parent was doing business in North Carolina through the presence of its wholly owned subsidiary there. The court noted that not only did the parent own all of the subsidiary's stock, but the same individuals ran both companies and the parent exerted complete financial and commercial control over it.

It mattered little to Justice Brandeis that the subsidiary was most likely incorporated to secure to the parent "some advantage under the local laws." To him, each company's maintenance of its own books and records and independent treatment of each other was conclusive. According to him, the "corporate separation, though perhaps merely formal, was real."

It is Charter's contention that *Cannon* is still the law and that since it has observed the corporate formalities of maintaining separate books and records and meetings of directors and stockholders, its subsidiaries should not be found to be its alter ego.

In recent years the continued validity of *Cannon* has been brought into doubt by a number of courts throughout the nation. As mentioned earlier, the courts in both *Crucible* and *Bulova* looked more to the economic realities of the situation than the formalities of corporate structure. So, too, did the District Court in *Energy Reserves Group v. Superior Oil Co.*, 460 F. Supp. 483 (D. Kansas 1978). In that case the District Court stated that the formal separation of corporate identities did not raise a constitutional barrier to the exercise of jurisdiction over a foreign corporation whose affiliated company (the parent) had a substantial nexus with the forum. *Id.* at 480. According to that court, *Cannon* is no longer followed. It believed that *International Shoe*, *supra*, dictated that it should look to the fundamental fairness of haling a foreign corporation before it. Fundamental fairness turned upon contacts with the forum, one of which was the foreign corporation's

economic benefit from the affiliate's conduct in the forum. The court added that jurisdiction would not attach absent a showing that the local corporation acted as the foreign corporation's "*agent or instrumentality.*" *Energy, supra*, at 490. (Emphasis added.)

Similarly, in *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965), cited by Charter for the proposition that *Cannon* is the law of Pennsylvania rather than the "economic reality" approach of PPG, the continued validity of that case was again brought into doubt. In *Cannon* Justice Brandeis wrote that "[t]hrough ownership of the entire capital stock and otherwise, the *defendant dominates* the [subsidiary] corporation, immediately and completely, and *exerts its control* both commercially and financially . . . as it does over those selling branches or departments of its business not separately incorporated." 267 U.S. at 335. (Emphasis added.) In *Botwinick*, on the other hand, Justice Jones stated that an alter ego relationship would be found where a subsidiary is so *dominated and controlled* by the parent that it is rendered a mere instrumentality of the parent. *Id.* at 72.

In the case at bar, Pandrol International is the wholly owned subsidiary of Charter. Charter has three representatives on Pandrol's eight-member board. Two of these gentlemen, Messrs. Richardson and Higham, are members of the Charter Executive Committee of its Board of Directors. The third, Mr. Poole, is a manager of Charter. [Richardson Dep. p. 109.] The five remaining directors are employed by Pandrol International; there are no outside directors.

Charter's representatives on Pandrol's board are non-executive directors and, therefore, have no management responsibilities. By this Charter implies that its representatives are not active *per se* in the day-to-day business of Pandrol. As directors of a corporation, however, they are responsible for Pandrol's overall business. As is commonly known, directors are elected by the stockholders to run the corporation. The directors in turn appoint (and dismiss) the officers who manage the business' daily affairs. Through their ability to appoint and remove directors and officers, Charter is able to determine

who will actually run the business, and can thereby exert a great deal of influence over them. For example, Pandrol International was not permitted to incorporate Pandrol Incorporated until the Charter Executive Committee gave its approval.

Through its ability to control who sits on Pandrol International's board, Charter is able to determine who sits on Pandrol Incorporated's board. While Pandrol Incorporated and Charter share no directors, two of Pandrol International's directors sit on its five-member board. Mr. Clough is Chief Executive and Managing Director of Pandrol International. Mr. Brown is an executive director of the parent. The remaining three board members are employees of Pandrol Incorporated. Again, there are no outside directors. Thus, it was only natural for Pandrol Incorporated to look to its parent, Pandrol International, and for Pandrol International to look to its parent, Charter, for letters of credit and loan guarantees when Pandrol Incorporated needed them to do business with Bethlehem Steel, as discussed *supra*.

Convincing testimony is presented by Charter indicating that it had no knowledge of either Pandrol International's or Pandrol Incorporated's day-to-day business. Nor did the subsidiaries' operating units feel controlled by Charter. Knowledge of this sort is not required by *Botwinick*, however. All it requires is that the parent exert such domination and control that the subsidiary is rendered an instrumentality of the parent. It is the court's opinion that Charter's domination and control of each subsidiary as an overall business has been established by virtue of the composition of the boards of directors.

In a similar manner, Charter has gained the control of Cape, of which it is a 67.3% owner. Since 1969 Charter has had four representatives on Cape's 13-member board. All four are members of Charter's Executive Board and have included Mr. Spiro—Deputy Chairman of Cape and Managing Director of Charter; Mr. Dent—Chairman of Cape; Mr. Higham—Mr. Dent's successor as Managing Director of Cape; Mr. Richardson; and Mr. Stopford-Sackville. According to PPG, there are only two outside directors on Cape's board.

Convincing evidence of Charter's control of Cape's board can be seen from two sources. In his deposition, quoted by PPG at pages 49-50 of their brief and substantially undenied by Charter [see Charter's App. B, p. 7], Mr. R.H. Dent, former Chairman of Cape, stated he resisted Charter's efforts to place more than two representatives on Cape's board. He testified that he felt two would be adequate to protect Charter's investment. Dent acknowledged that Charter had the power to elect more directors or take other action if it felt its interests were being jeopardized: "We knew that and they knew that."

The second source indicating Charter's control of Cape is Charter's May 21, 1969 Tender Offer to purchase 50% of Cape's outstanding stock. In that offer, Charter explicitly told Cape shareholders that its resultant 62.5% ownership of Cape would give it control of Cape.

> It is Charter's purpose to make use of the wide experience of Cape's management so that Cape can become the main channel for the expansion of Charter's industrial activities of this type; this could not be satisfactorily achieved unless Charter acquired a considerably larger holding such as would give Charter *control* of Cape. (Emphasis added.) Charter Appendix II,#13.

Although Cape officials testified that Charter did not control Cape and that Cape was run independently of Charter, the domination of a board of directors can, and usually does, result in substantial control of a corporation's business, whether perceived by its employees or not. The court concludes, especially in light of the facts of this case where Cape has refused to submit to the jurisdiction of this court, that the facts indicate a sufficient degree of control of Cape by Charter for this court to exercise its jurisdiction over Charter.

There still remains one more very significant contact between this forum and Charter. This involves the activities of another wholly owned Charter subsidiary, Charter Consolidated Services (hereinafter "CCS"). On several occasions in 1979, CCS employees visited Pennsylvania and carried on "a

continuous and systematic part of its general business within this Commonwealth." §5301(a)(2)(iii). It is the court's opinion that these contacts with the Commonwealth were sufficiently substantial so as to make it fair and reasonable for this court to exercise its jurisdiction over CCS, especially in view of its charging fees for the services conducted here. § 2011(c).

During 1979, CCS employees made five visits to this Commonwealth. Charter contends that these were made on behalf of Charter's "clients" and, therefore, cannot be considered as having been made on behalf of Charter. Closer examination of these "clients" reveals that two of the five were companies in which Charter owned a substantial interest and three visits involved Charter employees. The court believes that CCS merely acted as a conduit for Charter and did nothing that Charter would not have done itself had CCS not existed. In this regard, CCS's activities are comparable to those of the American marketing subsidiaries in *Crucible*, *supra*, and *Bulova*, *supra*. The court therefore concludes that CCS is Charter's alter ego and Charter is subject to this court's jurisdiction.

For example, in June, 1979, a CCS representative sold columbite to a Boyerstown, Pa., corporation on behalf of Amalgamated Tin Mines of Nigeria, a Charter client. The actual agent for this sale was Charter Metal & Ore Co., Ltd., a wholly owned subsidiary of CCS. Charter Metal and Ore does not employ anyone; all of its personnel are employed by CCS. The "employee" used to negotiate the columbite sale was a Mr. Waller, the manager of the metal sales department of Charter Consolidated, and an *employee of Charter.* [Rudland Dep., p. 120.]

Another "CCS employee," E.R. Snare, came to Pennsylvania in April, 1975, to meet in Pittsburgh with employees of Elliot Corporation. This was to discuss the sale of acid plant compressors to Societe Miniere Tenke Fungurume, a Charter client located in Zaire. Closer examination revealed that Societe Miniere Tenke Fungurume was a joint venture between Charter, which had a 14% interest, Standard Oil of Indiana (28%) and Anglo American Corporation. This venture lasted

from 1965-79. [Rudland Dep., p. 124.] According to PPG (Brief p. 15), Anglo American was the principal shareholder of Charter (36%) until 1979, and that it had four employees on Charter's board. Charter is said to have had three representatives on Anglo's board.

More important, however, is the identity of the "CCS employee" who conducted these meetings, Mr. Charlton. According to Mr. Rudland [Dep. p. 123], Charlton was *employed by Charter* and worked in its technical department.

Later in 1979 a CCS employee met in Pittsburgh with officials of the U. S. Bureau of Mines to discuss remote control devices. No evidence has been presented linking this visit to Charter.

Twice in 1979, however, Dr. Sage visited Pennsylvania on behalf of Highveld Steel and Vanadium Corp., Ltd. Dr. Sage of discussing business and promoting the Vanadium International Technical Committee, of which he was chairman. In its 1972 annual report, Charter lists Highveld Steel and Vanadium Corp., Ltd. as a principal investment (p. 37) and as a member of the Anglo American Group of Charter.

As can be seen by CCS's activities in this forum, at least three of the five visits were on behalf of Charter itself. It was Charter which stood to benefit and Charter employees were present here conducting business on Charter's behalf. The court concludes that Charter purposely availed itself of the privileges and benefits of our laws and could have reasonably anticipated being haled before this court; it is, therefore, subject to this court's jurisdiction. *World-Wide Volkswagen Corp.*, *supra*, *Hendrickson*, *supra*.

"When the sustaining of preliminary objections will result in dismissing the suit, . . . it should be done only in cases that are clear and free from doubt." *Williams v. Rose*, 403 Pa. 619, 622, 170 A.2d 577 (1961), *Robinson v. Philadelphia*, 400 Pa. 80, 161 A.2d 1 (1960). Even though Charter has supported its objections with credible testimony, such testimony has not totally convinced the court that Charter was not doing business in this Commonwealth through its subsidiaries, and its preliminary objections will be overruled.

ORDER OF COURT

AND NOW, to-wit, this 31st day of December, 1981, the preliminary objections raising questions of jurisdiction of Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finances, Ltd. are overruled and those parties are granted leave to file such responsive pleadings as they deem necessary within thirty (30) days of the date of this Order.

BY THE COURT

/s/ I. Martin Wekselman, J.

The Superior Court of Pennsylvania
Sitting at Pittsburgh

J. HANIEL HENRY
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
PITTSBURGH, PA.
15219

September 13, 1983

David G. Ries, Esquire
William M. Wycoff, Esquire
2900 Grant Building
Pittsburgh, Pennsylvania 15219

In Re: Anthony J. Barber, et al. vs. Pgh Corning Corp, et al., Appeal of Charter Consolidated, LTD., et al. No. 139 Pittsburgh, 1982

Gentlemen:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

"*ORDER OF COURT*

AND NOW, this 13th day of September, 1983, the application for reargument filed by appellant Charter Consolidated, LTD., is hereby denied.

PER CURIAM"

Very truly yours,

/s/ Irma T. Gardner
Deputy Prothonotary

ITG:kdc

cc: Stanley W. Greenfield, Esquire
Gerald C. Paris, Esquire
George E. McGrann, Esquire
Alexander Unkovic, Esquire
Brian H. Baxter, Esquire
Edmund L. Olszewski, Jr., Esquire
Larry P. Gaitens, Esquire
Frank Petramolo, Jr., Esquire
George H. Cohen, Esquire
Richard M. Colasurd, Esquire
Honorable I. Martin Wekselman

Appendix E

ORDER OF COURT

AND NOW, to-wit, this 20 day of January, 1982, upon consideration of the Motion for Amended Order of Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finance, Ltd., it is hereby Ordered that the Motion is granted and, for purposes of permitting an immediate appeal under Rule 311(b)(2) of the Pennsylvania Rules of Civil Procedure, the Order of Court dated December 31, 1981 is amended by adding the following:

> "A substantial issue of jurisdiction is presented by the preliminary objections of Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finance, Ltd."

BY THE COURT:

/s/ I. Martin Wekselman, J.

Section 5301 of the Pennslyvania long-arm statute, 42 PA. CONS. STAT. ANN. § 5301 (1981), provides in pertinent part:

(a) General rule.—The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

* * *

(2) *Corporations.*—

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth.

* * *

(b) Scope of jurisdiction.—When jurisdiction over a person is based upon this section any cause of action may be asserted against him, whether or not arising from acts enumerated in this section. Discontinuance of the acts enumerated in subsection (a)(2)(i) and (iii) and (3)(i) and (iii) shall not affect jurisdiction with respect to any act, transaction or omission occurring during the period such status existed.

Section 5322 of the Pennsylvania long-arm statute, 42 PA. CONS. STAT. ANN. § 5322 (1976), provides in pertinent part:

(a) General rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business of the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

* * *

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

* * *

(b) Exercise of full constitutional power over nonresidents.—In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the

most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of Jurisdiction.—When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

* * *

No. 83-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARTER CONSOLIDATED, LTD., *et al.*,
Petitioners,

v.

ANTHONY A. BARBER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1591

CHARTER CONSOLIDATED, LTD., *et al.*,
Petitioners,

v.

ANTHONY A. BARBER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

---

BRIEF IN OPPOSITION

For the reasons stated herein, respondents believe that petitioners' request for a writ of certiorari should be denied.[1]

SUMMARY OF ARGUMENT

Petitioners assert two "questions presented" for review by this Court. The first is whether "the due process clause . . . was violated by the [lower courts'] exercise of *in personam* jurisdiction over a foreign parent

---

[1] Petitioners seek a writ of certiorari to the *Supreme* Court of Pennsylvania. That court, however, simply declined to exercise discretionary review over the decision of the Superior Court of Pennsylvania, without itself passing on the merits of the jurisdictional issues. On the assumption that Charter means to request review of the *Superior* Court's decision, we respond to Charter's petition as though it were a petition for a writ of certiorari to the Superior Court of Pennsylvania. See *Callender* v. *Florida*, 383 U.S. 270 (1966).

corporation [*i.e.*, Charter Consolidated, Ltd.] based *solely* upon the parent's *ownership* of subsidiaries [*i.e.*, principally Cape Industries, Ltd.] which were present in the forum state." (Petition, at i) (emphasis added). This question is simply not posed by this case. The courts below did not exercise jurisdiction over Charter by reason of Charter's mere *ownership* of Cape, but on the basis of findings—amply supported by the record—that Charter actually controlled and participated in Cape's business affairs, including the activities giving rise to plaintiffs' cause of action. And petitioners concede that a court may exercise *in personam* jurisdiction over a parent corporation in such circumstances.

Petitioners' second "question presented" is whether "the due process clause . . . was violated by the exercise of *in personam* jurisdiction over a foreign corporation [Charter] whose only contacts with the forum state consisted of occasional visits to the state by employees, . . . unrelated to the cause of action." This question is directed at an alternative holding of the Pennsylvania Superior Court, predicating *in personam* jurisdiction over Charter based on Charter's contacts with Pennsylvania apart from Charter's domination over and participation in Cape's business transactions in Pennsylvania. This alternative holding is not necessary to the disposition of this case.

In any event, petitioners' second "question presented," like the first, begs the question actually posed in this case. Petitioners' characterization of Charter's transaction of business in Pennsylvania as "occasional visits to the state by employees" disregards the findings of the courts below. Petitioners' quarrel is with those findings and with the lower courts' application of the appropriate legal standard to those findings. Petitioners do not dispute the legal standard applied below, namely, whether Charter conducted a "continuous and systematic" part of its general business in the forum state. Petitioners' factual challenge does not warrant review by this Court.

ARGUMENT

1. Petitioners' first "question presented" is whether "the due process clause . . . was violated by the [lower courts'] exercise of *in personam* jurisdiction over a foreign parent corporation [Charter] based *solely* upon the parent's *ownership* of subsidiaries [principally, Cape] which were present in the forum state." (Petition, at i) (emphasis added). Petitioners' first "question presented" is not posed by this case. The lower courts did not assert jurisdiction over Charter simply by virtue of Charter's *ownership* of Cape. Rather, they relied on Charter's domination of, and participation in, Cape's business activities, including the very activities alleged to have caused plaintiffs' injuries. And petitioners concede that *in personam* jurisdiction may properly be exercised over a foreign parent corporation in such circumstances. See *infra*, at 8.

Petitioners base their first "question presented" not on what the lower courts actually found, but on petitioners' view of the record, which has been consistently rejected by the courts below. Thus, petitioners assert that Cape "was run independently of Charter" during the entire period (1964-1972) that Cape supplied asbestos to Pittsburgh Corning; and, more particularly, that Charter "never participated in decisions concerning . . . [Cape's] portfolio investments; budgetary matters; advertising practices or marketing strategies; the organization, operation and structure of Cape subsidiaries; or the mining, marketing, prospecting or sale of asbestos." (Petition, at 5). In short, petitioners maintain that Charter and Cape had an arms-length relationship at all relevant times.

The Superior Court found, however, upon consideration of the extensive record in this case, that the facts did not support Charter's assertion (Petition App. B, at 9a-10a) (emphasis added):

> While Charter sought [in its brief and argument before the court] to divorce itself from Cape and to depict it as an almost unrelated entity, the record clearly refutes such a position. . . [A]lthough Cape may technically *appear* to be an independent business entity, the record shows clearly the extent to which it comprises an operating arm of Charter.

As the court explained, "Charter is itself only a holding company which has chosen to perform all its business functions through operational arms that happen to be set up legally as separate corporations." (*Id.*, at 14a; see *id.*, at 9a). These subsidiary corporations are organized "within Charter's four main divisions, which are Mining, Industrial, Finance and Administration and Services. Thus, for instance, Charter's headquarters staff, including executives, are formally employed and paid by a wholly owned subsidiary." (*Id.*, at 9a).

Charter's Industrial Division—one of Charter's operational departments—"actually consists of a collection of subsidiaries," including Cape.[2] (*Ibid.*). As the record shows, Charter has elected to conduct its operations through subsidiaries, rather than through intra-corporate departments, in order to "get the most efficient result[s]." (R. 1414a.) As the head of Charter's Industrial Division, who was at the same time Chairman of Cape's Board, testified, "I entirely accept that it is by no means

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[2] Charter uses wholly owned subsidiaries, which Charter administers at its offices in London, to hold the stock of Charter's industrial subsidiaries. Two of these holding companies, Charter Consolidated Investments and Central Mining Finance—co-petitioners herein—hold the shares of Cape. As Charter acknowledges (Petition, at 3 n.1), the jurisdictional issues relating to Charter Consolidated Investments and Central Mining Finance are identical to those relating to Charter. The Superior Court held—based, *inter alia*, on Charter's own concessions—that "[t]he record shows that both of [these] subsidiaries were administrative tools used by Charter to hold the stock of Cape." (Petition App. B., at 4a n.1).

the only way one would do it. If I may say so, I think of more importance to a business is the way it is run rather than formal organization." [3] (R. 1415a; see also R. 1242a-1243a.) And as the Superior Court found, "[d]espite such separate incorporation, Charter's total control over Cape . . . is so clear, that to reach any other conclusion in this case would be to blindly exhault form over substance." (Petition App. B, at 14a).

The Superior Court recognized that Charter, itself, had expressed its intention to assume control over Cape as an integral component of Charter's own industrial activities. In the course of acquiring over 60 percent of Cape's common shares, Charter's shareholder prospectus explained (quoted in Petition App. B, at 10a) (emphasis added):

> It is Charter's purpose to make use of the wide experience of Cape's management so that Cape can become the main channel for the expansion of *Charter's industrial activities* of this type; this could not be satisfactorily achieved unless Charter acquired a considerably larger holding such as would give Charter control of Cape.

The Superior Court found: "The record makes it clear that since it acquired such a substantial ownership of Cape, Charter has been well represented by its own executives placed on Cape's Board of Directors." [4] (Peti-

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[3] The testimony quoted in text described both Cape's organizational structure and the organization of Charter's Industrial Division. (See R. 1412a-1415a, 1423a-1425a).

[4] From the inception of Charter's relationship with Cape, Charter was represented on Cape's Board by two of eleven directors. (R. 1322a; 674a-698a.) Following Charter's takeover of Cape in 1969, Charter placed a third director on Cape's Board. The Chairman and Managing Director of Cape at that time, R. Dent, unsuccessfully resisted Charter's efforts to put more than two representatives on Cape's Board. As Dent testified, "Two is enough . . . [t]o protect" Charter's interests. (R. 1352a.) Dent believed that if Charter thought "their interest [was] being harmed they have the power

tion App. B, at 10a). The Charter representatives placed on Cape's Board were drawn from the highest ranking Charter officials, and one of these representatives usually assumed the post of Chairman or Deputy Chairman of Cape. (R. 324a; 1057a, 1199a, 1213a; 1267a; 1328a; 1351a; 1396a; 1439a, 1449a-1450a; 1452a-1453a.) And, as the court found, "Charter has retained and exercised full control over [this] subsidiar[y] through [Cape's] Board[] of Directors." (*Id.*, at 14a). Thus, one of Charter's directors acknowledged that there was no instance during his tenure on Cape's Board (1970-1980) "in which the Executive Directors of Cape out-voted the Charter Directors who were opposed to any particular proposal put forward at a Board Meeting." (R. 1463a-1464a). In the same vein, Cape's Chairman and Managing Director (*i.e.*, Cape's chief executive officer) testified that he abided by Charter's wishes, "conscious" that if he "opposed the Charter directors' wishes . . . they have the power to overcome [his] position in any event." (R. 1364a.)

In exercising its control over Cape, as the Superior Court found, Charter "participated in Cape's important business decisions" (Petition App. B, at 10a), which covered the gamut of Cape's activities—including those giving rise to plaintiffs' cause of action. (Indeed, Cape's principal business activities at all relevant times were the mining and sale of asbestos; until recently, Cape Industries, Ltd., was called "Cape Asbestos, Ltd."). Thus, Charter dictated decisions concerning "[c]ommercial and

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at the next Board meeting to elect quite a few more [directors]. . . . There are all sorts of things they could do, we knew that and they knew that, and it seemed pointless to waste people's time by putting any more than two representatives on the Board." (*Ibid.*)

Cape paid the directors' fees earned by Charter's representatives on Cape's Board directly to Charter, rather than to the directors personally. (R. 1200a.) Following Charter's takeover of Cape in 1969, Charter brought onto its Board as a director the Chairman and Managing Director of Cape. (R. 1410a.)

financial decisions of Cape and its subsidiaries," "changes in the reorganization of Cape or its subsidiaries," "portfolio investment by Cape or its subsidiaries," "the prospecting, the mining development [and] technical advice regarding asbestos" (R. 1376a-1377a); "the pricing of asbestos," "health warnings about . . . asbestos," and the "marketing of asbestos" (R. 1380a-1381a; see Dep. of R. Dent, at 166); and the sale of Cape's asbestos mining operations[5] (R. 1375a, 1377a; 1036a-1038a; 1399a-1400a).

Contrary to Charter's representations in its Petition, it was "[t]his total involvement by Charter in Cape's affairs"—including the very activities causing plaintiffs' injuries—that warranted the court's conclusion "that through Cape, Charter has engaged in business affairs in Pennsylvania to a degree sufficient to assert *in personam* jurisdiction over Charter."[6] (Petition App. B, at

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[5] One of the common Charter/Cape directors testified that he, for one, felt the future for asbestos sales was not likely to be favorable in part because of the "well-known health objections to its use." (R. 1358a.) He, along with his colleagues on Cape's Board, however, reached the "concensus" that it "would be wiser to continue until the reasons for trying to dispose of [the asbestos mining operations] became stronger." (*Ibid.*)

[6] In asserting jurisdiction over Charter, the Superior Court (and the Court of Common Pleas) relied, as well, on Charter's control over a pair of industrial subsidiaries known as the "Pandrol Group" —which beyond "question . . . engaged steadily in business affairs in" Pennsylvania (Charter has conceded that the Pandrol companies "were present in Pennsylvania," Charter's Superior Ct. Brief, at 48). "Although Charter again [sought] to segregate itself from Pandrol in the face of this jurisdictional problem," the Superior Court observed, "the facts simply do not support Charter's position." Based on the record as a whole, the court concluded that "[i]t simply cannot be realistically maintained that Charter and Pandrol are, in substance, independent entities." (Petition App. B, at 10a-11a). The Superior Court's reliance on Charter's control over the Pandrol Group was not necessary to the court's decision, in that Charter's control over and participation with Cape in the business activities giving rise to plaintiffs' cause of action provides an ample

10a). The court below found that Charter did not merely *own* Cape, as Charter insists, but "made [Cape a] constituent part[] of its [own] operating divisions." (*Id.* at 14a). And by its "domination and control" over Cape, Charter "render[ed] the subsidiary a mere instrumentality of the parent." (*Ibid.*).

Charter's quarrel with the decisions of the lower courts reduces fundamentally to a dispute over the facts established by the voluminous record in this case, or over inferences to be drawn from those facts. Thus, Charter's first "question presented" is built upon Charter's factual perspective, not on the findings of the lower courts or on what the record, in its entirety, actually shows. Charter concedes, as a legal matter, that "a court is justified in asserting jurisdiction over a foreign parent whose subsidiaries have contacts with the forum . . . if it can be demonstrated that the subsidiary is the . . . 'mere instrumentality' of the parent." (Petition, at 10). And, as just noted, this very finding was made by the lower courts in this case. Accordingly, Charter's first "question presented" is simply not posed by what the lower courts in this case actually decided.[7]

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basis for *in personam* jurisdiction. But, in any event, this additional factor furnishes further support for the Superior Court's decision.

[7] Based on its mischaracterization of the holdings below, Charter asserts that those holdings conflict with this Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925) and other lower court decisions that "have interpreted *Cannon* to hold that a court is justified in asserting jurisdiction over a foreign parent whose subsidiaries have contacts with the forum only if it can be demonstrated that the subsidiary is the 'alter ego' or 'mere instrumentality' of the parent." (Petition, at 10). As we have described, the lower courts here held that the very standard Charter endorses was satisfied in the circumstances of this case. That should dispose of Charter's reliance on cases embracing that standard.

In any event, this Court's decision in *Cannon* does not purport to establish federal due process principles binding on the states. The Court in *Cannon* addressed, in the context of a diversity case,

2. Petitioners' second "question presented," like the first, is predicated on a characterization of the record at odds with the findings of the courts below. Putting aside the lower courts' reliance on Charter's involvement in Cape's affairs, and focusing on the lower courts' consideration of Charter's direct transaction of business in

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whether a foreign corporation was "present" in the forum state, for purposes of service of process, by virtue of the presence of a subsidiary. *Cannon*, which pre-dated *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), resolved this issue by resort to general federal corporate law principles. The Court expressly acknowledged that "[n]o question of the constitutional powers of the state, or of the Federal government, is directly presented[;] [t]he claim that jurisdiction exists is not rested upon the provisions of any state statute, or upon any local practice dealing with the subject." 267 U.S., at 337. See also *United States* v. *Scophony Corp.*, 333 U.S. 795, 804 n. 13, 812-818 (1948).

The Pennsylvania courts in this case properly applied the federal *constitutional* principles that govern a case such as this. The constitutional inquiry is whether the defendant's "conduct and connection with [the forum state] are such that [it could] reasonably anticipate being haled into court" there. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980). Suit may be brought in any forum in which the defendant corporation has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945). "The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction." *Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); accord, *Keeton* v. *Hustler Magazine, Inc.*, 52 L.W. 4346, 4349 n.13 (U.S. Mar. 20, 1984). As we have described, the Superior Court found that Charter "participated in Cape's important business decisions"—which included the very decisions giving rise to plaintiffs' cause of action (see *supra*, at 6-7)—and, indeed, exercised "total control over Cape." (Petition App. B, at 10a, 14a). Having participated in—indeed, having controlled the outcome of—the business decisions (concerning the sale of thousands of tons of asbestos to Pittsburgh Corning) giving rise to plaintiffs' injuries, Charter's "conduct and connection with" Pennsylvania plainly justified the lower courts' exercise of jurisdiction over it.

Pennsylvania,[8] petitioners suggest that "the due process clause . . . was violated by the exercise of *in personam* jurisdiction over a foreign corporation whose only contacts with the forum state consisted of occasional visits to the state by employees, . . . unrelated to the cause of action." (Petition, at i).

As a threshold matter, it is significant that Charter's direct business activities in Pennsylvania documented in the record by no means constitute the totality of Charter's transactions in that State on an ongoing basis, even without regard to Charter's involvement in the affairs of its subsidiaries. As the Superior Court observed, "[i]n the course of discovery in this case[,] Charter refused to supply information about such contacts with our Commonwealth occurring more than a year prior to the filing of this suit." (Petition App. B, at 11a). As the timing of plaintiffs' suit was entirely coincidental to Charter's transaction of business in Pennsylvania, the Superior Court treated the activities documented during the one-year time frame for which Charter provided discovery as merely representative of Charter's ongoing contacts with that State.

In this context, the Superior Court found that Charter's direct activities in Pennsylvania "constituted 'a continuous and systematic part of [Charter's] general business,'" and accordingly concluded that these activities were "of sufficient magnitude to make it fair and reasonable to exercise jurisdiction over Charter." (*Ibid.*). The court explained (*id.*, at 15a-16a):

> This conclusion is mandated by the record, which demonstrates that even within the limited period of

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[8] It bears emphasis that Charter's domination of Cape's business activities provides sufficient grounds for the lower courts' assertion of jurisdiction over Charter, regardless of Charter's other contacts with Pennsylvania. Whether such other contacts provide an independent basis for jurisdiction is a question not necessary to the resolution of this case.

> time for which it submitted responses in discovery, Charter's own business contacts with our State were quite diverse in nature, and broad in scope. The record shows that in a single twelve month period, several different Charter representatives, from at least three of its separate operating divisions, visited our Commonwealth for business transactions. These direct business involvements by Charter were not limited to a single customer or business project, but included five separate Pennsylvania based customers or concerns, and dealt with matters as diverse as sales of minerals, acid plant compressors, and remote control devices, and other business projects and research endeavors. Further, during the same limited time period about which it made disclosures, Charter was not only a seller, but also purchaser, obtaining 300 shares of stock in a transaction through a Philadelphia broker. Based upon these transactions, all within the year prior to the filing of this suit, we find no merit in Charter's claim that it had not itself engaged in business in our Commonwealth sufficient to justify the assertion of jurisdiction by our courts.

Charter's effort to characterize its purposeful resort to Pennsylvania's market—which is highly developed in the areas of Charter's key business interests—as "five isolated and unrelated visits" (Petition, at 16) ignores the quality of those business contacts in the context of Charter's general business objectives and activities, and the fact that the transactions documented through discovery must be taken as merely indicative of Charter's ongoing relationship with the forum state.

In any event, this case presents no issue as to applicable legal principles. As noted, the Superior Court determined that Charter's activities in Pennsylvania constituted a "continuous and systematic part of its general business"—which, as petitioners acknowledge, is the federal due process standard governing the exercise of personal jurisdiction based on activities unrelated to the

plaintiffs' cause of action.[9] *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, No. 82-1127 (Apr. 24, 1984), slip op., at 7 ("continuous and systematic");[10] *International Shoe Co.* v. *Washington*, *supra*, 326 U.S., at 318 ("continuous" and "substantial"); *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 448 (1952) ("continuous" and "substantial"; "continuous and systematic"). Based on a view of the facts at odds with the findings of the lower courts, petitioners challenge the lower courts' *application* of this standard to the facts of this case. Petitioners' fact-oriented challenge does not warrant this Court's time or attention.

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[9] Pennsylvania's long-arm statute incorporates this federal constitutional standard. (Petition App. B, at 7a & n.4).

[10] This Court's decision in *Helicopteros* does not affect the disposition of the instant case for two reasons. First, jurisdiction in *Helicopteros* was dependent exclusively on activities in the forum state unrelated to the cause of action in that case. Here, by contrast, Charter's domination of Cape's affairs—including Cape's sales of asbestos, Cape's central business activity—provide a sufficient basis for jurisdiction independent of Charter's activities in Pennsylvania unrelated to plaintiffs' cause of action. (See note 8, *supra*). Second, even with respect to the Superior Court's alternative holding predicating jurisdiction on Charter's activities in Pennsylvania unrelated to plaintiffs' cause of action, *Helicopteros* is clearly distinguishable from the instant case on its facts. The defendant's principal contacts in the forum state in *Helicopteros* consisted of purchases and purchase-related activities. Purchases are at best incidental to the core business activities of a company—*i.e.*, those that produce revenue. Charter, by contrast, had contacts with Pennsylvania of a more substantial character. Even putting to one side Charter's transaction of business there in conjunction with Cape, Charter's activities in Pennsylvania were fee-generating activities going to the heart of Charter's principal business concerns. By contrast to the defendant in *Helicopteros*, Charter has unquestionably sought to exploit Pennsylvania's market to advance Charter's core business interests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 83-1591

IN THE

Supreme Court of the United States

October Term, 1983

CHARTER CONSOLIDATED, LTD., CHARTER CONSOLIDATED INVESTMENTS, LTD., and CENTRAL MINING FINANCE, LTD.,

Petitioners,

vs.

ANTHONY A. BARBER, et al.,

Respondents.

BRIEF OF PPG INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Listing Under Supreme Court Rule 28.1

As required by Supreme Court Rule 28.1, the following is a listing of the subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent PPG Industries, Inc.

Arkansas Chemicals, Inc.
Asahi-Penn Chemical Company, Ltd.
Boussois S.A.
Industrie Vernici Italiane S.p.A.
Inveca-Pittsburgh C.A.
Italver-Pittsburgh Paints S.p.A.
Pennvasia Limited
Pinturas Pittsburgh de Mexico S.A.
Pinturas Pittsburgh Iberica, S.A.
Pittsburgh Corning Corporation
PPG Industries Investments S.r.l.
PPG Industries Taiwan, Ltd.
Puerto Rico Olefins, Inc.
S.A. Peintures Corona
Silenka B.V.
Societe Allymer S.A.
Tatung Coatings Co.
Vernate Pennitalia S.p.A.

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PPG Industries, Inc. (hereinafter "PPG"), a Respondent to these proceedings, respectfully requests that this Court deny Petitioners' request for the issuance of a writ of certiorari to the Supreme Court of Pennsylvania to review the finding that jurisdiction has been properly exercised by the courts of the Commonwealth of Pennsylvania over Petitioners, for the reasons that follow.

Statement of the Case

The Superior Court of Pennsylvania affirmed the trial court's finding of jurisdiction over Charter[1] by carefully evaluating all of the affiliating circumstances and facts presented to it with regard to Charter. Those affiliating circumstances included Charter's direct contacts with the Commonwealth of Pennsylvania as well as Charter's contacts with Pennsylvania through the pervasive activities of several of its closely-held and directed subsidiaries, Cape[2] and Pandrol[3]. A short summary of the relevant facts concerning these companies and their inter-relationships follows.

It has been admitted by Charter that Cape is subject to the jurisdiction of the courts of the Commonwealth of Pennsylvania[4], and Charter does not contest that Pandrol is also subject to jurisdiction in Pennsylvania courts. The forum-affiliating activities of Cape, moreover, are directly related to the causes of action set forth by Plaintiffs: Cape shipped raw asbestos to Pittsburgh Corning's Port Allegany, Pennsylvania facility where the Plaintiffs allege they were exposed to and harmed by

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[1] PPG will follow the practice of Petitioners by referring to each of the Petitioners through the use of the name "Charter" in this brief, since Charter admits the three Petitioners should be treated similarly.

[2] "Cape" refers to a group of companies engaged in the mining, manufacturing and sale of asbestos and asbestos products. Cape sold asbestos to Pittsburgh Corning in Pennsylvania where the Plaintiffs in this action were allegedly harmed by exposure to such asbestos.

[3] "Pandrol" refers to another group of companies wholly-owned by Charter, which conducts extensive activities within Pennsylvania.

[4] In depositions taken of Charter personnel sitting on the Board of Cape, it became clear that Cape made a purposeful decision to withdraw from any participation in asbestos litigation in the United States. Thus, in cases such as the one presently before this Court, Cape, even though properly served and subject to the jurisdiction of American courts, refuses to appear and participate in such litigation.

asbestos. Cape was the supplier to this Pittsburgh Corning facility, and jurisdiction over Cape is thus self-evident.

The lower court found that these activities of Cape and Pandrol should be attributed to Charter for jurisdictional purposes based on a careful consideration of the structure of Charter and its business and how Charter managed those businesses. The most important aspect of Charter to note for such purposes is that Charter itself does not conduct business, but rather conducts essentially all of its business through wholly-owned or majority owned subsidiaries. Charter itself is merely a holding company for the stock of the many subsidiaries through which its business is conducted.

Although all business is conducted through subsidiaries, Charter management[5] itself is organized by "divisions". The four main divisions of Charter are Mining, Industrial, Finance, and Administration and Services. Each of these divisions is headed up by a member of the Charter Executive (a group of top management that constitutes the highest authority within Charter), and that Charter Executive remains responsible for the operations and profitability of the subsidiaries comprising that division.[6] Charter's income

[5] Even Charter management is formally employed by a separate subsidiary corporation rather than by Charter itself. These subsidiary companies are referred to within charter as the "service companies" and organizationally fit within Charter's Administration and Services Division.

[6] For example, Geoffrey Higham, in 1981, was the Charter Executive responsible for the Industrial Division of Charter, which is the division containing Cape and its affiliated companies and the Pandrol companies. To discharge his duties to Charter with respect to these companies, Higham sat on the Board of each of the industrial subsidiaries and served as Chairman of at least three of the companies, including Cape.

is derived almost wholly from the operations of its subsidiaries in its various divisions,[7] and it is clear that Charter itself does not conduct any business other than the business conducted through its subsidiaries. The Superior Court concluded after a review of the structure and operations of Charter that "Charter conducts the affairs of its Industrial Division by exercising control over the operations of its industrial subsidiaries". *Barber v. Pittsburgh Corning Corp.*, 464 A.2d 323, 328; Petition for Writ, Appendix B at 9a). This is, in the main, accomplished by placing Charter Executive personnel on the Boards of each subsidiary and thereby ascertaining that Charter may direct the business activities of each subsidiary.

Both Cape and Pandrol are members of Charter's Industrial Division. The ties between each mentioned group of companies and Charter are as intimate as suggested generally above.

At present, Charter owns 67.3 percent of the stock of Cape Industries, PLC.[8] Charter identifies Cape as one of its subsidiaries; indeed, as one of its most significant subsidiaries. According to figures supplied by Charter, approximately 17 percent of its income is derived from the dividends it receives from Cape. To protect its interest in Cape, Charter consistently has placed its highest ranking executives on the Board of Cape, usually including the Chief Executive Officer of Charter. As a result, there is an overlap of four directors between the boards of Charter and Cape, and each person serving on

[7] Some of Charter's income is derived from investment rather than industrial activities, but apparently even these activities are carried out through subsidiaries.

[8] Cape also has a number of wholly-owned subsidiaries, each engaging in some aspect of the asbestos business. Charter and Cape treat these companies as one, and PPG will do so in this brief also.

the Board of both companies is of the highest executive responsibility within Charter.

The evidence developed during the course of jurisdictional discovery showed that Cape invariably followed the recommendations of the Charter members of Cape's Board concerning dividends to be declared to Charter and other business matters before the Cape Board. In fact, one representative from Charter could not remember an instance during the entire ten-year span of time he sat on the Cape Board wherein the Cape Board outvoted the Charter representatives on the Board on any matter or failed to follow the recommendations of the Charter representatives.

Charter's direct participation in Cape's affairs is also evident from the fact that a member of the Charter Executive held the position of either Chairman or Deputy Chairman of Cape at all times since 1969.

Perhaps the clearest and best indication of the relationship between Charter and Cape is given by the statement made by Charter at the time it obtained the majority interest in Cape:

> It is Charter's purpose to make use of the wide experience of Cape's management so that Cape can become the main channel for the expansion of Charter's industrial activities of this type; this could not be satisfactorily achieved unless Charter acquired a considerably larger holding such as would give Charter control of Cape. *Barber v. Pittsburgh Corning Corp.*, 464 A.2d at 329; Petition for Writ, Appendix B at 11a.

Other indications of the control exercised by Charter over Cape include:

> (a) Charter dictated a restructuring of Cape's management soon after obtaining control of Cape in 1969.

(b) The Charter Annual Reports identify Cape as a subsidiary and discuss the business of Cape as an aspect of Charter's activities.

(c) All financial statements of Cape are consolidated with those of Charter.

(d) Charter has indicated that it is willing to stand behind any loans or other financial obligations incurred by Cape.

The record generated before the lower court showed in much more detail than can be set forth here the close operating relationship between Charter and Cape, leading the Pennsylvania Superior Court to hold that "although Cape may technically appear to be an independent business entity, the record shows clearly the extent to which it comprises an operating arm of Charter." *Barber v. Pittsburgh Corning Corp.*, 464 A.2d at 329; Petition for Writ, Appendix B at 10a. A frank admission of the control exercised by Charter over Cape was made by Ronald Dent, a high Cape official, who stated that Charter did not put any more representatives on the Cape Board because both Charter and Cape realized that Charter could control the vote of the Cape Board at any time Charter felt it necessary by the mere election of new directors, and there was no need to waste time about such matters.

Charter's relationship with Pandrol is strikingly similar. Pandrol International is a 100 percent owned subsidiary of Charter, and Pandrol, Inc., an American company, is in turn wholly-owned by Pandrol International. The record below showed that both Pandrol International and Pandrol, Inc. conducted

substantial and continuous business[9] within the Commonwealth of Pennsylvania. As a summary, the jurisdictional record showed the following with regard to the relationship between Charter and the Pandrol companies:

> (a) As with Cape, a member of the Charter Executive was assigned responsibility to oversee the operations of the Pandrol companies. In addition, a member of the Charter Executive has been named Chairman of Pandrol International.
>
> (b) There is a significant overlap in the boards of directors of Charter and Pandrol International. There are no directors of Pandrol International who are not either members of the Charter management or employees of Pandrol itself.
>
> (c) The evidence showed that Pandrol, Inc., the American subsidiary, was not incorporated until specific approval was received from Charter.
>
> (d) When Pandrol, Inc. required loans from American banks, Charter guaranteed those loans. When a prospective supplier of materials requested guarantees of payment, Charter provided those guarantees. Charter was also willing to provide performance bonds for the Pandrol subsidiaries.

The relationship between Pandrol International and Pandrol, Inc. is equally close. When Pandrol, Inc. was incorporated, the English company dictated the membership of the Board of Directors and set the agenda for board meetings. When the American company needed technical assistance, it was forthcoming from the English parent. The majority of Pandrol, Inc.'s board are

[9] Pandrol's business in the Commonwealth of Pennsylvania was not, however, related to the causes of action asserted by Plaintiffs in this case.

also members of Pandrol International's board, and the American company follows a series of detailed reporting requirements to its English parent.

The Superior Court concluded after a careful review of the extensive record that "Pandrol is not an independent entity, even if set up as a separate business corporation under the law. Rather, it is clearly a business division of its corporate owner, which controls all of its operations .... Charter directs Pandrol's policies just as another business entity would control the activities and directions of one of its operating divisions." *Barber v. Pittsburgh Corning Corp.*, 464 A.2d at 329, Petition for Writ, Appendix B at 11a.

Finally, the evidence amassed in jurisdictional discovery revealed a consistent pattern of direct Charter activities within the Commonwealth of Pennsylvania. Within a single year[10] Charter made a number of encursions into Pennsylvania to conduct business and for investment transactions. The Pennsylvania courts found that these direct activities, as well as Charter's conduct of business through its subsidiaries in Pennsylvania, fulfilled the constitutional standards permitting the exercise of jurisdiction over Charter with respect to this action.

[10] Charter limited its discovery responses concerning its activities in Pennsylvania to one year and thus there is presently no record of Charter's Pennsylvania-related activities for any other period of time.

Reasons for Denying the Writ

The Pennsylvania courts correctly utilized the appropriate decisions of this Court, notably *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to find that the exercise of jurisdiction by the courts of Pennsylvania over Charter passed muster under the due process clause of the Fourteenth Amendment. The suggestion by Charter that the Pennsylvania courts overruled this Court's holding in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), is incorrect, since *Cudahy* was decided before the revision to constitutional standards of jurisdiction articulated in *International Shoe* and must be read in light of subsequent jurisdictional conceptual development. This is exactly what the Pennsylvania courts did.

As a second point, the Pennsylvania courts conducted a careful review of all contacts of Charter with Pennsylvania, both directly and through the activities of controlled companies, to determine that Charter's presence in Pennsylvania was continuous and substantial and satisfied without difficulty the appropriate minimum standards necessary for the invocation of jurisdiction. The affiliating circumstances cited by the lower courts demonstrate the propriety of finding jurisdiction under this Court's pronouncement of the relevant constitutional standards, and the correct due process standard was used by the lower court.

I. The Pennsylvania court's finding of jurisdiction based in part on the activities of Charter's subsidiaries comports with the due process clause of the Fourteenth Amendment.

Charter has framed the issue for which it seeks review from this Court as whether the lower court, in basing

jurisdiction in part on the activities of Charter's subsidiaries in Pennsylvania, implicitly conflicts with a sixty year old holding of this Court in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). By framing the issue in this way, Charter would contend that the *Cannon* case incorporates a due process standard for judging jurisdiction over a parent based on the activities of its subsidiaries. However, the fact of the matter is that the *Cannon* case, however valid under 1925 jurisdictional conceptions, is wholly uninformed by subsequent due process jurisdictional analysis and was correctly perceived by the Pennsylvania courts to be of limited value in assessing whether Charter should be subject to this suit in Pennsylvania.

In *Cannon*, this Court held that a parent corporation could not validly be served with process in a jurisdiction in which it was not itself physically present by serving its subsidiary which is doing business in the state, unless the parent so ignored the separate existence of its subsidiary that the independence of the entities was pure fiction. If those formalities were ignored, such that the corporate veil could be pierced, then the parent corporation could be deemed physically present in the jurisdiction through its subsidiary.

The holding in the *Cannon* case made jurisdictional sense in a day when the constitutional exercise of jurisdiction required the physical presence (actual or implied) of the defendant. *Pennoyer v. Neff*, 95 U.S. 714 (1877). However, the rationale of the *Cannon* case was undermined by *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny. Since the physical presence theory was jettisoned, *Cannon* does not reflect current jurisdictional thought. Like any other jurisdictional problem, whether a parent corporation is

subject to the power of a court based on its relationship to a subsidiary within the forum must be analyzed under the *International Shoe* standards of minimum contacts and fundamental fairness, not under the mechanical application of corporate law concepts, as Charter would have this Court rule.[11]

PPG submits that under the standards of *International Shoe* and subsequent cases, the correct standard to use to determine whether Pennsylvania courts have jurisdiction over Charter is not a "piercing the corporate veil" analysis, but rather a reasoned analysis of the relationships among the Charter companies, the function of the subsidiaries, the activities of Charter and its subsidiaries in Pennsylvania, and the benefits derived by Charter from the Pennsylvania activities. Only by use of such a sensitive analysis may a court correctly determine whether Charter has such minimum contacts with Pennsylvania such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. at 316.

This approach, mandated by this Court's jurisdictional decisions going back for a period of forty years, is exactly the approach taken by the Pennsylvania courts

---

[11] There are a number of cases which have recognized that *Cannon* does not provide a viable jurisdictional analysis since *International Shoe*. *See Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F. Supp. 483, (D. Kansas 1978) ("The Court ... holds that formal separation of corporate identities does not raise a constitutional barrier to the exercise of jurisdiction over a non-resident whose affiliated corporation has a substantial nexus with the forum." 460 F. Supp. at 489); *Grimandi v. Beech Aircraft Corp.*, 512 F. Supp. 764 (D. Kansas 1981); *Roorda v. Volkswagenwerk A.G.*, 481 F. Supp. 868 (D. S.C. 1979); *Crucible, Inc. v. Stora Kopparbergs Bergslags AB*, 403 F. Supp. 9 (W.D. Pa. 1975); and *Bulova Watch Co., Inc. v. K. Hattori & Co.*, 508 F. Supp. 1322 (E.D. N.Y. 1981).

to find Charter subject to jurisdiction in Pennsylvania. The Pennsylvania Superior Court clearly and correctly considered each factor deemed relevant for due process analysis by this Court, as can be seen from its opinion itself:

> After thorough consideration of the record as a whole, we conclude that the lower court was correct in its determination on the personam jurisdiction issue presented in this case. We find that Charter's involvements in Pennsylvania satisfy the tests set forth in *Koenig v. International Brotherhood of Boilermakers*, [284 Pa. Super. 558, 426 A.2d 635 (1980)] and other cases so that an assertion of Pennsylvania court jurisdiction over Charter is clearly constitutional. More particularly, we first find it evident that Charter has purposely availed itself of the privilege of acting within Pennsylvania and thus invoked the benefits and protections of our laws. Charter did this constantly and repeatedly over the years preceding the filing of this suit in its conduct of recurring business affairs through its Cape and Pandrol operations as well as the individual acts of various representatives. The second requirement, that the cause of action must arise from the defendant's activities within the forum state, is clearly satisfied. In light of the allegations of the Plaintiffs' Complaint, this occurred in its sale of asbestos to their employer. The third requirement is that the acts of Charter must have been substantial enough with regard to Pennsylvania so that our courts' exercise of jurisdiction over Charter is reasonable. Again, there is no question that the activities of Charter, through Cape, Pandrol and various individual representatives, has been both continuous and substantial in Pennsylvania. The extent of these commercial transactions makes the assumption of jurisdiction completely reasonable and proper in this case.

Barber v. Pittsburgh Corning Corp., 464 A.2d at 330, Petition for Writ, Appendix B at 12a-13a.

Furthermore, the conclusions of the lower court that Cape and Pandrol's activities should be counted in the jurisdictional calculus are clearly supported by the record. As shown in the Statement of the Case above, Charter's relationship with each subsidiary is intimate, Charter's ability to control their operations undoubted, and the financial benefits to Charter of operations in Pennsylvania unquestionable. But the most revealing and decisive consideration of all is the fact that Charter does not conduct business on its own, but rather accomplishes all of its economic and industrial activities through its subsidiaries. The subsidiaries *are* Charter.[12]

In conclusion, the Pennsylvania court conducted an extensive factual review of the interrelationships of Charter and its subsidiaries, and all contacts with Pennsylvania, in conformance with the applicable due process considerations for jurisdictional determinations. The lower court did not use an improper standard to find jurisdiction and did not overrule or ignore any applicable authority from this Court. Since the lower court made a factual determination based on a correct legal analysis and appropriate authority, no reason exists for this Court to grant Charter's Petition for a Writ of Certiorari to the Pennsylvania Supreme Court.

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[12] It is also important to note that Cape, as indicated above, has declared it will never again appear in an asbestos-related lawsuit in the United States. Charter has the undoubted ability to control, influence or change this determination. Charter is attempting to hide behind its subsidiary while accepting the economic benefits of its activities in Pennsylvania and PPG submits that this is a strong factor indicating the fundamental fairness of subjecting Charter to jurisdiction in this action.

II. The Pennsylvania courts correctly found that Charter's relationship with the Commonwealth of Pennsylvania provided a basis for the assertion of personal jurisdiction over Charter.

The Pennsylvania courts asserted jurisdiction over Charter only after a careful review of all of Charter's forum contacts. This review included an examination of Charter's contacts through the activities of its controlled companies, Cape and Pandrol, as well as an examination of Charter's own direct contacts with Pennsylvania. In fact the courts below found that Charter's direct activities within Pennsylvania constituted a continuous and systematic part of its general business such that Charter could reasonably anticipate being haled into court in Pennsylvania, citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). Judge Montgomery writing for the Pennsylvania Superior Court stated, "[w]e find that Charter's own business contacts in our Commonwealth justify the assertion of jurisdiction over it, even without regard to the evidence of domination and control of its subsidiaries which are clearly engaged in business in our state." *Barber v. Pittsburgh Corning Corp.*, 464 A.2d at 332, Petition for Writ, Appendix B at 16a.

The discussion above shows that, unlike the manner in which Charter framed the issue, the Pennsylvania courts did not assert jurisdiction over Charter solely on the basis of the forum contacts of Charter, or, solely because of the forum contacts of Charter's subsidiaries. Rather the courts below asserted jurisdiction because the aggregation of Charter's direct contacts and the contacts of its subsidiaries were such as to make the exercise of jurisdiction consistent with traditional notions of fair play and substantial justice.

But even if attention is directed only to Charter's own direct activities within Pennsylvania, the Pennsylvania courts' rulings in favor of jurisdiction are correct. A review of the record in this case demonstrates that even within the limited period of time for which it submitted responses in discovery, Charter's *own* direct contacts with Pennsylvania were such that the assertion of jurisdiction by the courts of Pennsylvania was proper under this Court's relevant constitutional pronouncements. In *International Shoe Co. v. Washington, supra*, this Court held that constitutional due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant which has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316, quoting from *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). This Court has further stated that the proper inquiry is whether the defendant's conduct and connection with [the forum state] are such that [it could] reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 297 (1980). Furthermore this Court in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), has held that a corporation, in a suit not arising out of forum activities, may constitutionally be amenable to jurisdiction if the corporation's forum activities are continuous and substantial.

The record below demonstrates that in one single twelve month period, a number of different Charter representatives visited the Commonwealth of Pennsylvania for the purpose of conducting business transactions. These Charter business contacts in Pennsylvania were not limited to a single customer or business endeavor. In fact, Charter dealt with at least

five separate Pennsylvania-based customers or business concerns on matters as diverse as sales of minerals, acid plant compressors, remote control devices, and other business and research projects. During the same limited time period, for which it made discovery disclosures, Charter also engaged in at least one stock transaction within the Commonwealth of Pennsylvania.

Reviewing all of the Charter contacts with Pennsylvania in light of the fact that they merely represent the contacts for the one twelve month period that Charter chose to disclose, it seems clear that Charter is amenable to jurisdiction based *solely* on its direct contacts with Pennsylvania. These contacts in one twelve month period are continuous and substantial within the meaning of the *Perkins* case, *supra*. In addition, certainly Charter could reasonably anticipate being haled into Pennsylvania courts based upon its regular business contacts with the Commonwealth. Finally, such contacts in a one year period demonstrate that the maintenance of this suit in Pennsylvania does not offend the traditional notions of fair play and substantial justice inherent in the notion of due process. *International Shoe, supra.*

While the above demonstrates that Charter's own contacts with Pennsylvania were substantial and continuous enough to support the constitutional exercise of jurisdiction, the fact remains that the lower courts had more upon which to rely. The Pennsylvania courts had an enormous record of direct, continuous, and substantial contacts by Charter's intimately controlled subsidiaries. Furthermore, these contacts of one such subsidiary, Cape, with Pennsylvania, were directly related to the cause of action asserted by the Plaintiffs in this action. Thus the courts below had an ample

aggregate of forum-affiliating contacts, both directly and indirectly through subsidiaries, upon which to justify the assertion of jurisdiction over Charter.

As with the first issue cited by Charter, the Pennsylvania courts used a correct legal analysis coupled with an amply supported factual record to determine that Charter is subject to the jurisdiction of the courts of Pennsylvania because of its continual and substantial business operations within the Commonwealth. These findings are clearly supportable under the relevant due process decisions of this Court, and thus, there is no overriding reason for this Court to review the determination of the Pennsylvania courts.

Conclusion

For all of the above reasons, Charter's Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania should be denied.

Respectfully submitted,

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Dated: April 25, 1984

CERTIFICATE OF SERVICE

I, GEORGE E. McGRANN, hereby certify that on the 25th day of April, 1984, true and correct copies of the foregoing Brief of PPG Industries, Inc. in Opposition to Petition for Writ of Certiorari to the Supreme Court of Pennsylvania were deposited in a United States post office or mailbox, with first-class postage pre-paid, and properly addressed to the Clerk of this Court, and to the persons listed below:

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No. 83-1591

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARTER CONSOLIDATED, LTD., CHARTER CONSOLIDATED INVESTMENTS, LTD., and CENTRAL MINING FINANCE, LTD.,
Petitioners,

—v.—

ANTHONY A. BARBER, et al.,
Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 9, 1984

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Petitioners Charter Consolidated, Ltd., Charter Consolidated Investments, Ltd., and Central Mining Finance, Ltd. (collectively "Charter" or "petitioners") hereby reply to the briefs of respondent PPG Industries, Inc. ("PPG") and plaintiffs-respondents ("plaintiffs") (collectively "respondents").

ARGUMENT

I. The Pennsylvania Courts Did Not Apply The Proper Legal Standard In Asserting Jurisdiction Over A Foreign Parent Corporation On The Basis Of The Forum-Related Activities Of Its Subsidiaries

In opposing Charter's petition, plaintiffs have suggested that Charter's arguments "reduce[ ] fundamentally to a dispute

over the facts," Brief In Opposition of Plaintiffs-Respondents [hereinafter cited as "Plaintiffs' Brief"], at 8; they seek in this fashion to trivialize the issues Charter has raised. This Court should not be misled by the plaintiffs' attempts to characterize this case as the application of well-settled principles to disputed facts. *Id.* at 8-9 n.7. At issue here is more than a factual dispute. The Pennsylvania courts devised a new, and considerably more relaxed, standard for "piercing the corporate veil" and thereby subjecting foreign parent corporations to the jurisdiction of Pennsylvania courts. In so doing, they disregarded this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), and the sixty years of precedent that have followed it.

The depiction of the issues before this Court offered by respondent PPG is considerably more forthright, and far more faithful to the Pennsylvania Superior Court's decision. PPG argues, quite simply, that *Cannon* is no longer good law, stating,

> the fact of the matter is that the *Cannon* case, however valid under 1925 jurisdictional conceptions, is wholly uninformed by subsequent due process jurisdictional analysis and was correctly perceived by the Pennsylvania courts to be of limited value in assessing whether Charter should be subject to this suit in Pennsylvania.

Brief of PPG Industries, Inc. [hereinafter cited as "PPG's Brief"], at 10. PPG further argues that "*Cannon* does not reflect current jurisdictional thought," *id.*, and refers this Court to cases "which have recognized that *Cannon* does not provide a viable jurisdictional analysis," *id.* at 11 n.11.

Both plaintiffs and PPG argue that *Cannon* has been undermined by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Plaintiffs' Brief at 8-9, n.7; PPG's Brief at 10-11. The questions presented in *International Shoe* and in *Cannon* were quite different. *International Shoe* involved a foreign corporation that had limited contacts with the forum state; the question before this Court was whether such contacts, although minimal, were sufficient so that the assertion of jurisdiction

over the corporation did not offend due process. In *Cannon*, by contrast, this Court addressed the question of what relationship between a foreign parent and a domestic subsidiary would be sufficient to permit the assertion of jurisdiction over the parent.

This Court has never held that *International Shoe* undermined *Cannon*. Indeed, four years after the *International Shoe* decision, this Court recognized the continued validity of *Cannon* in *National Carbide Corp. v. Comm'r of Internal Revenue*, 336 U.S. 422, 438-39 n.21 (1949). Nor has this Court ever held that the ownership of stock of a domestic subsidiary is a "minimum contact" sufficient to subject a parent corporation to the jurisdiction of the forum state. Because the question of whether *International Shoe* overruled *Cannon* is one on which the parties differ, and because the question has obvious significance to the many courts asked to assert jurisdiction over foreign corporations, this Court should take this opportunity to resolve that question.

In their opposing briefs, respondents attempt to depict Cape and Pandrol as mere appendages of Charter. Despite their efforts, certain facts are beyond dispute: both Cape and Pandrol are separate corporations, with separate management personnel, offices, books and records, and bank accounts; both engage in extensive and wide ranging business activities; neither is a sham entity, devised to shield Charter from liability. In the case of Cape, Charter owns only 67.3 percent of its stock, and Cape's board is accountable to those public shareholders who hold the balance of Cape's stock.

Although both plaintiffs and PPG seek to put a more sinister gloss on these relationships, it is apparent that Charter's relations with these subsidiaries are not in any way atypical. Through its representatives on the Cape and Pandrol boards, Charter participates in major policy decisions; it is not, however, involved in the day-to-day operations and management of either entity. The importance of this case resides in the lower courts' conclusion that such a relationship is sufficient to render Charter the *alter ego* of both Cape and Pandrol. The lower courts found nothing unique in the Char-

ter-Cape or Charter-Pandrol relationships to justify ascribing the acts of the subsidiaries to the parent. It follows that *any* parent corporation, subjected to the analysis performed by the courts of Pennsylvania, would be held subject to the jurisdiction of the Pennsylvania courts by virtue of a subsidiary's presence there. Neither party opposing Charter's petition really disputes this conclusion, or suggests what additional factors would be necessary to show that the parent is sufficiently separate from the subsidiary such that the parent would be beyond the jurisdiction of Pennsylvania.

However the Charter-Cape and Charter-Pandrol relationships are characterized, they are certainly much more distant than that between the parent and subsidiary in *Cannon*. There, Justice Brandeis stated that the parent dominated the subsidiary "immediately and completely." 267 U.S. at 335. If such a relationship was an insufficient premise for jurisdiction over the parent in *Cannon*, then the far more distant relationships between Charter and its subsidiaries are surely insufficient here. To conclude otherwise is to reject the authority of *Cannon*, and that is precisely what the Pennsylvania courts have done.

While it is not the function of this Court to resolve factual issues, neither should the Court be influenced by misleading factual statements regarding the nature of Charter's relationship with its subsidiaries. Respondents' briefs, particularly the brief submitted by plaintiffs, contain very serious misrepresentations.

The most significant of these misrepresentations is the claim that Charter itself participated in activities which gave rise to the cause of action. Plaintiffs' Brief at 2, 6, 7. It is regrettable that the plaintiffs have chosen to mislead the Court in this fashion. Charter has never mined, manufactured, or marketed any asbestos products. Furthermore, Cape has never consulted Charter on a wide variety of policy matters relating to asbestos, including prospecting, marketing, pricing, and health warnings. (R. 1142a; R. 1240a-41a; R. 1376a-77a; R. 1431a).[1]

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1 "R." refers to the Record on Appeal filed with the Superior Court of Pennsylvania.

Neither the Superior Court nor the trial court found that the cause of action arose out of activities in which Charter participated.[2] Nor does PPG make any such claim in its submission to this Court.

Although space limitations do not permit a thorough rebuttal to all of respondents' factual arguments, Charter notes a few of the more serious distortions.

1. Respondents contend that Charter "is merely a holding company . . . [which] does not conduct any business other than the business conducted through its subsidiaries." PPG's Brief at 3-4, 13. Charter is a diversified company whose principal activities are finance and investment. In addition to holding a wide range of investments, Charter performs a variety of services for approximately 50 corporate clients. These include corporate secretarial services, share registration, consultation on technical aspects of mining, buying and selling of precious metals, and financial advice. (R. 1280a-81a; R. 1286a-89a). Charter also acts as an underwriter and has underwritten all of Cape's recent public offerings. (R. 1096a-97a; 1127a; 1138a-40a; 1261a; 1307a).[3]

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2 This Court should not be misled by plaintiffs' technique of combining excerpts from the Superior Court's opinion with statements of their own design. An example appears at Plaintiffs' Brief at 6: "[i]n exercising its control over Cape, as the Superior Court found, Charter 'participated in Cape's important business decisions' (Petition App. B at 10a), which covered the gamut of Cape's activities—including those giving rise to plaintiffs' cause of action." Other examples of this technique can be found in Plaintiffs' Brief at 7-8, 9 n.7.

3 Respondents' characterization of Charter changes with the requirements of the argument they wish to advance. When they wish to pierce Charter's corporate veil, they describe Charter as a mere holding company, with no business of its own. PPG's Brief at 3-4, 13. However, when they wish to maintain jurisdiction over Charter on the basis of its employees' visits to Pennsylvania, they argue that "Charter's activities in Pennsylvania were fee-generating activities going to the heart of Charter's principal business concerns," and that "Charter has unquestionably sought to exploit Pennsylvania's market to advance Charter's core business interests." Plaintiffs' Brief at 12, n.10.

2. Respondents contend that Charter indicated that it would stand behind financial obligations incurred by Cape. PPG's Brief at 6. The record reveals, however, that Charter never informed Cape that it was willing to stand behind any of Cape's loans or bank overdrafts. (R. 1070a-71a; R. 1408a; R. 32b).

3. Contrary to PPG's suggestion that Charter's consolidation of its financial statements with those of Cape indicates unusual interdependence between the companies, PPG's Brief at 6, Charter is required by English law to consolidate the accounts of a majority-owned subsidiary. (R. 1416a; R. 1448a; R. 33b). Charter is similarly required by law to identify its subsidiaries in its Annual Reports.

4. PPG argues that "Charter dictated a restructuring of Cape's management soon after obtaining control of Cape in 1969." PPG's Brief at 5. However, Charter's representatives on Cape's board did not prompt the replacement of Cape's managing director, R.H. Dent, with G.A. Higham. Rather, all of Cape's directors decided to suggest that Mr. Dent relinquish certain managerial responsibilities in light of his age. (R. 1362a-64a; R. 1478a-79a). Mr. Dent, and not Charter, chose Mr. Higham as his successor, and this selection was later ratified by Cape's directors.

5. PPG argues that "Cape invariably followed the recommendations of the Charter members of Cape's Board concerning dividends to be declared to Charter and other business matters before the Cape Board." PPG's Brief at 5. The record shows that business proposals were initiated by Cape management, and not by Charter representatives. (R. 1493a-95a; R. 28b-30b). In addition, since it was the practice of Cape's board to reach decisions by consensus, there were no occasions for Charter's representatives to be "outvoted" as respondents suggest, PPG's Brief at 5; Plaintiffs' Brief at 6. (R. 1216a-19a; R. 1460a-62a; R. 1494a-95a; R. 27b).

6. PPG contends that Cape "has declared it will never again appear in an asbestos-related lawsuit in the United States" and that Charter has the ability to control this decision. PPG's Brief at 13, n.12. The record contains no such "declaration" or anything approaching it. The record further demonstrates that the decision to default in this case was made by Cape management, not by Charter. (R. 1142a-43a; R. 1382a).

II. The Pennsylvania Courts Violated The Due Process Clause Of The Fourteenth Amendment When They Asserted Jurisdiction Over Charter On The Basis Of Five Isolated And Unrelated Visits To The Forum State

At issue here is the level of activity sufficient to establish jurisdiction over a foreign corporation where such activity is unrelated to the cause of action. As petitioners previously noted, the same issue was before the Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 52 U.S.L.W. 4491 (U.S. April 24, 1984), *rev'g* 638 S.W.2d 870 (Tex. 1982). Petition at 16. Like the petitioner in *Helicopteros*, Helicopteros Nacionales de Colombia, S.A. ("Helicol"), Charter has never been authorized to do business in the forum state, never maintained an office in the state, never had an agent for service of process in the state, never had employees based in the state, and never recruited employees in the state. *See id.*, 52 U.S.L.W. at 4491, 4493.

In *Helicopteros*, Helicol's contacts with Texas, the forum state, consisted of visits by its chief executive officer to engage in contractual negotiations, acceptance of checks drawn by an in-state bank, purchases, and training sessions. *Id.*, 52 U.S.L.W. at 4491, 4493. This Court held that such contacts did not constitute "continuous and systematic general business contacts." *Id.*, 52 U.S.L.W. at 4493.

Charter has even less connection with Pennsylvania than Helicol had with Texas. First, the five visits to Pennsylvania by Charter employees were entirely unrelated to each other. In *Helicopteros*, by contrast, Helicol acknowledged that all but

one of its contacts with Texas related to a single transaction. Brief Of Petitioner In Reply To Brief Of Respondent In Opposition To Petition For Writ of Certiorari To The Supreme Court of Texas, [hereinafter cited as "Helicol Reply"], *Helicopteros*, 52 U.S.L.W. 4491, at 2, 3. Unlike the diverse visits to Pennsylvania by Charter employees, the majority of Helicol's contacts with Texas were in furtherance of a common purpose. Since Helicol's activities were deemed an insufficient predicate for jurisdiction, Charter's isolated trips certainly "cannot be described or regarded as a contact of a 'continuous and systematic' nature, as *Perkins* [*v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952)] described it . . . and thus cannot support an assertion of *in personam* jurisdiction . . . ." *See Helicopteros*, 52 U.S.L.W. at 4493.

Moreover, Charter's visits to Pennsylvania reveal quantitatively less connection with the forum than the multiple visits by numerous personnel which this Court deemed insufficient as a jurisdictional predicate in *Helicopteros*. *See id.* Charter's contacts with Pennsylvania are confined to one securities transaction through an in-state broker, and five isolated trips by four Charter employees. Helicol's contacts consisted, *inter alia*, of substantially more visits by many employees. *See* Helicol Reply, App. at 80a.

Furthermore, the visits to Pennsylvania by Charter employees were incidental to its business. In 1979, Charter's net assets totalled approximately £340,000,000 and its earnings were approximately £44,000,000 (R. 545a). There is no indication in the record that Charter derived any income from the five visits of its employees to Pennsylvania during this period. Helicol, in contrast, purchased substantially all of its helicopter fleet in the forum state and conducted approximately $4,000,000 worth of business there. Helicol Reply at 3.

After *Helicopteros*, it is clear that the visits of Charter employees to Pennsylvania do not amount to a continuous and substantial course of business activity and cannot furnish a basis for jurisdiction over Charter. Realizing this, the plaintiffs argue on at least three occasions that these visits are merely an alternative basis for jurisdiction, and that this Court need not

measure them against the *Helicopteros* standard. Plaintiffs' Brief at 2, 10 n.8, 12 n.10. This argument misstates the Superior Court's conclusion and the grounds on which it is based. The Superior Court premised jurisdiction over Charter on the totality of its supposed contacts, both direct and indirect. Even PPG recognizes this; it argues that the lower courts asserted jurisdiction based on "the aggregation of Charter's direct contacts and the contacts of its subsidiaries." PPG's Brief at 14.

Because the Superior Court's assertion of jurisdiction was based on an aggregation of factors, it is by no means clear that Charter's direct contacts with Pennsylvania simply furnished an "alternative holding," as plaintiffs would have it. These direct contacts are an insufficient basis for jurisdiction under *Helicopteros*, and a reversal in accordance with that opinion is required.

CONCLUSION

For the reasons stated herein, and in the Petition, petitioners respectfully urge that the petition for a writ of certiorari be granted.

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Respectfully submitted,

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